77-1080
NO. _____

In the Supreme Court of the United States

October Term, 1978

VIRGIL REDMOND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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VIRGIL REDMOND, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Tenth Circuit, which was entered January 4, 1977. A timely Petition for rehearing was filed with the Court of Appeals, and same was denied on December 21, 1977. The decision of the Appellate Court affirmed the judgment of conviction entered in the United States District Court for the District of Utah, Central Division, the Honorable Willis W. Ritter, Trial Judge. Petitioner is convicted of eight counts alleging the use of mails in a fraudulent sale of securities. 15 U.S.C. §§77q(a) and 77x.

The principal grounds for appeal to the United States Court of Appeals, Tenth Circuit, were based upon:

I.

VIRGIL REDMOND, PETITIONER, WAS DENIED A FAIR TRIAL DUE TO THE CONDUCT OF THE TRIAL JUDGE IN EXPRESSING OPINIONS OF THE GUILT OF THE PETITIONER AND HIS CO-DEFENDANTS. THE TRIAL JUDGE ASSUMED THE ROLE OF THE PROSECUTOR. THE COURT MAINTAINED A DEMEANING ATTITUDE TOWARD DEFENDANTS' COUNSEL.

II.

PETITIONER'S ATTORNEY WAS INTIMIDATED BY THE CONDUCT OF THE TRIAL JUDGE AND AS A CONSEQUENCE HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

III.

MISCELLANEOUS PROCEDURAL ISSUES.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, entered January 4, 1974 was selected for official publication and is reported at 546 F.2d 1386 (10th Cir. 1977), and is attached in appendix A, infra.

DATE OF JUDGMENT AND TIME OF ENTRY

The Judgment of the Court of Appeals was entered on January 4, 1977. The Petition for rehearing was denied on December 21, 1977.

JURISDICTION

Jurisdiction of this Honorable Court is pursuant to 28 U.S.C. §1254(a).

ISSUES PRESENTED

I.

THE CONDUCT OF THE TRIAL COURT SO PREJUDICED PETITIONER'S CAUSE, HE WAS DENIED DUE PROCESS OF LAW AS WELL AS EFFECTIVE ASSISTANCE OF COUNSEL.

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

CONSTITUTIONAL PROVISIONS INVOLVED

A. United States Constitution:

AMENDMENT V

As pertinent here, provides:

". . . nor be deprived of life, liberty, or property, without due process of law; . . ."

AMENDMENT VI

As pertinent here, provides:

". . . In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATUTES

A. 15 U.S.C. §§77q(a) and 77x

As pertinent here, provides:

§77q. Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly–

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

§77x. Penalties.

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations

promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement, filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

CONCISE STATEMENT OF THE CASE

Virgil Redmond, hereinafter referred to as "Petitioner", was charged in a multicount indictment with the use of the mails in the fraudulent sale of securities. (15 U.S.C. §§77q(a) and 77x. The case was tried and Petitioner found guilty of eight counts. He was sentenced to serve eighteen years in a Federal Penitentiary and was fined $10,000.00.

The trial of Petitioner included co-defendants. One co-defendant was Rio de Oro Mining Company. The prosecution submitted evidence which tended to show Petitioner and the co-defendants were engaged in a scheme to defraud members of the public by selling stock of the defendant corporation. Rio de Oro Mining Company controlled gold, coal, uranium and other minerals. The Government claimed there were no minerals and the mines were used as part of a conspiracy to sell stock in a worthless corporation. Petitioner at the trial and appellate levels, urged he had withdrawn from the conspiracy to distribute stock to nominees, and to exchange same for goods and services. His theory was not allowed to go to the Jury.

Defense counsel did not offer evidence in Petitioner's behalf. There was evidence the mines in Utah contained coal. Evidence which would have helped the Petitioner. During the course of trial, conduct of the Trial Judge becomes an issue.[1]

[1] The question of instructions, speedy trial and other issues which were raised at the Appellate level, are not being urged to this Court as a basis for the issuance of the Writ of Certiorari.

The Honorable Willis W. Ritter, hereinafter referred to as Judge Ritter or Trial Court, caused Petitioner's trial to be tainted. Petitioner urges he was denied due process of law and effective assistance of counsel. Justice Seth, in describing the conduct of the Trial Court in the instant case stated:

> ". . . We said in the *Golden Rule* case that the comments taken as a whole did not destroy the fairness of the trial. When the standards in the above entitled case are applied, *we must say here that the case before us comes close to the line,* but is still within permissable bounds."[2] (Emphasis supplied.)

This Petition encorporates a separate appendix hereinafter referred as Appendix No. One. Appendix One is a copy of the Petition for Writ of Mandamus Or Prohibition submitted by the Solicitor General of the Department of Justice to United States Court of Appeals, Tenth Circuit, concerning the conduct of the trial Judge. References to Appendix One will be made during the course of this statement as well as following arguments. The complaints in Appendix One mirror the complaints of Petitioner.

Some of the more flagrant examples of conduct during the course of his trial are hereinafter set forth. References are to the transcript volumes presently in the possession of the Clerk of the United States Court of Appeals, Tenth Circuit. Judge Ritter starts his four day trial. Vol. II, p. 66, lines 17-23 (Jury present):

> ". . . Alright, proceed. I will tell you about these opening statements. I want them brief and concise. I want them to the point. And I don't want them very long. And we don't have that kind of time. I think they serve a very poor purpose, anyway.
>
> If I hear any argument in the opening statement, I will stop you and tell you to take your seat."

Prior to this colloquy between court and counsel, the Judge had been informed the trial would take three weeks.

[2] At page 1391 (546 F.2d 1386).

The government had anticipated the trial would have taken approximately two weeks, and according to Judge Ritter, Judge Halbert had been told that the trial would require three weeks (Vol. IV, p. 800, lines 22-23). However, Judge Ritter stated the trial was going to take four days. (Vol. IV, p. 800, line 25.) Fifty witnesses and exhibits notwithstanding, the trial was going to last four days.

In order to achieve his goal the Judge commenced jury selection. At Vol. II, p. 54-55, the Court is addressing a prospective juror.

> "Mr. Elliott: The two new ones, Mr. Nelson and Mr. Robinson.
> The Court: Okay. What is your occupation?
> Juror: I work for the State of Utah, Department of Community Affairs.
> The Court: In what capacity?
> Juror: State Volunteer Programs Coordinator is my title.
> The Court: State volunteer programs for what?
> Juror: Coordinator. State Volunteer Programs Coordinator.
> The Court: You are a correlator?
> Juror: Coordinator.
> The Court: Coordinator. What do you coordinate?
> Juror: All the State Volunteer Programs in the state.
> The Court: What do the volunteers do?
> Juror: Any state agency who uses volunteers, I help coordinate their program.
> The Court: Well, you are not going to coordinate anything here. You step down."

The Trial Court refused to rule on certain pre-trial motions submitted by Petitioner as well as the other co-defendants. Although the question of speedy trial is not being asserted in this Petition, the issue was raised at the trial and appellate levels.

From the very beginning of the trial, all of the lawyers in the case, both for prosecution and defense were intimidated and unable to fully function for and behalf of their respective

clients. For example, Mr. Van Durunen who represented Rio de Oro had been identified as "young man" by a Juror. Judge Ritter (Vol. I, p. 40, lines 22-23) for some reason had some great objection to the expression of thanks by Mr. Van Durunen in being referred to as a "young man." The Judge stated *inter alia* "Never mind. You won't be after we get through this trial."

During the course of choosing the jury, after Judge Ritter had exhausted the entire panel and new jurors had been called, at Vol. II, p. 49, lines 16-26, he stated:

> "Now, I tell you that much about the case in order to ask you a few questions.
> Have you ever heard of a case like that, or have you ever been concerned with a case like that?
> Has anybody ever attempted to impose upon you or has anybody imposed upon you by peddling stock or securities?
> Have you ever heard of a case like that? Any of you at all?"

During the course of trial certain occurrences, such as above, took place which not only insured the Petitioner would be found guilty, but also intimidated his counsel. During the course of cross-examination by Mr. Leedy, Petitioner's trial counsel, he asked certain questions of Mr. Holeman, a witness, concerning geological formations of ground owned by the defendant corporation. It was the Defendant's theory the property did have mineral values and hence there was no fraudulent transaction. In that regard Mr. Leedy at Vol. II, p. 181, line 21, asked the question: "And did the information that was contained in the U.S. Geological Survey confirm *everything* that Mr. Redmond had told you?" Upon receiving an affirmative response by the witness, Mr. Leedy sat down. Then the Court stated at p. 182 the answer was a broadside. The Court inquired of the prosecution whether it wanted to cross-examine. When Mr. Mabe, U.S. Attorney stated, "Pardon me, your Honor?", the court just proceeded to conduct its own examination for approximately three pages of the transcript.

At the conclusion of the examination, the word "everything" used in the question by Mr. Leedy, was stricken from the record. It should be noted at no time did Mr. Leedy object to the questions of the Court, and in fact later apologized to the Court for even asking the question. (Vol. II, p. 184, line 18.) There had been no motion or request to strike by the Respondent.

In the trial, Mr. Kroulis is a witness. The issue involved in the law suit is whether or not fraudulent acts concerning the sale of securities were committed by the Petitioner and the co-defendants. During the course of examination by the government, Mr. Kroulis testifies concerning the amounts of money owed to him by the defendant corporation. Its officers were seeking to satisfy the debt with the exchange of stock of the corporation. In addition, Mr. Powers, one of the co-defendants, according to Mr. Kroulis' testimony, was also seeking to sell to Mr. Kroulis a boat for the purpose of retiring some of the corporate debt. Mr. Kroulis states he and Mr. Powers during the course of the discussion reached the point between debtor and creditor where demands are being made for payment. Mr. Kroulis testifies Mr. Powers states he has been known to kill a man in Kentucky some years prior, and he should not be pushed. The testimony is admitted over objection by the Defendants.

The Court not only overrules the objection but at p. 473 of Vol. III at line 20, the Court states, "Well, let's see if we can find out more about that." Then, after making inquiry in front of the jury, the Court concludes, at p. 474, "Did the jurors hear that? Alright, Now, who was talking?"

The excerpts which have been presented to this Court are in an effort to illustrate the overall impact of Judge Ritter's actions in the trial of the Petitioner which resulted in a lack of due process being afforded to Petitioner. Nor was he afforded the effective assistance of counsel, since Mr. Leedy was unable to participate fully in the trial.

Attached hereto in Appendix B is the affidavit of Virgil Redmond. Mr. Leedy, Mr. Redmond's trial counsel, has submitted an affidavit denying each and every statement found in

Mr. Redmond's affidavit. However, upon inquiry by present counsel, Mr. Redmond insists his affidavit is true and the statements of Mr. Leedy are incorrect.

During the course of the trial, witnesses were being held hostage. For example, Vol. II, p. 68, lines 5-15, the Court orders the sequester of witnesses. Mr. Hatch, one of the attorneys in the case, advises the Court it is his desire to talk to some of the witnesses prior to testifying. The Court refuses to allow him to talk to the witnesses, forbades the witnesses from talking to anyone and orders the United States Marshall to guard them. See attached Appendix D.

During the course of pre-trial, Douglas W. Litchfield informs the government as to the nature of his testimony. When Petitioner learned of the nature of his testimony, he contacted the witness who agreed to testify for the defense. It was estimated the trial would take two to three weeks. Hence, it necessitated a readjustment of scheduling when Judge Ritter said it would take four days. Virgil Redmond's trial counsel made no request for a short recess in order to allow the witness to fly from Montana to Utah. Appendix C, the affidavit of William Douglas Litchfield is included.

With the announcement of the verdict, the Judge congratulated the Jury on reaching the "proper" decision, and immediately raised the bail of the Defendants to $500,000.00, notwithstanding the prosecution requesting $100,000.00. The judge was incensed and angered throughout the entire trial. He opined many times he did not have stomach for the trial and did not want to try it. At the conclusion of the case he denied pre-trial motions, because he wanted to make sure jeopardy would attach and the guilty persons would not "get off".

The United States also complains about the conduct of Judge Ritter. (See Appendix One, not attached to the Petition.) *No* assertion is made the Judge is dishonest or a bad person. However the government argues Judge Ritter is a law unto himself and brings disrespect upon the judicial system. It also asserts Judge Ritter's trials do not result in the admini-

stration of justice. The government's Petition was filed with the Court of Appeals, Tenth Circuit, who had knowledge of same when it denied Redmond's Petition for rehearing.

It is from this framework that the following argument is submitted.

REASONS FOR GRANTING WRIT

I.

THE JUDGE'S ACTIONS DEPRIVED PETITIONER OF DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner, although he could have urged to this Court all of the propositions which were urged to the Court of Appeals, he chose not to do so. Rather he is choosing to submit the issue concerning the failure of the lower Court to recognize the impact of Judge Ritter's conduct in this case. The lower Court sees it, but does nothing to remedy the situation. It cannot be overlooked that Justice Seth, with having no compelling need or obvious reason, went to some extent to find the conduct of Judge Ritter ". . . comes close to the line, . . ." It is the position of your Petitioner, Judge Ritter crossed the line.

The Tenth Circuit over the years has built judicial veneers in attempting to sustain the trial conduct of Judge Ritter. If at any time the Tenth Circuit were to grant reversals due to the conduct of the Judge Ritter, they would be flooded with Petitions having claimants bearing rights entitling them to relief. The problem has been hidden in phraseology which masks their true character. For example, in *Wittlock vs. The United States*, 429 F.2d 942 (10th Cir. 1970), the Court stated *inter alia*, counsel had been "rebuffed", "disappointed" and perhaps had "discomfort". What really occurred was trial counsel was intimidated, bullied and threatened in order to convict Mr. Wittlock. As to speedy trial in the instant case, the Tenth Circuit treated the issue as one of speedy trial. However, the real issue is the Judge failed or refused to rule on the motion until after the conclusion of the trial.

In *United States vs. Hatahley*, 220 F.2d 666 (10th Cir. 1955) the Court characterized the trial as, ". . . tried in an atmosphere of maximum emotion and a minimum of judicial impartiality . . ." (220 F.2d 670). And in *United States v. Ritter*, 273 F.2d 30 (10th Cir. 1959) it was noted as to the second appeal after re-trial (*United States vs. Hatahley*, 257 F.2d 290 (10th Cir. 1958)):

> ". . . [W]e again observe that a casual reading of the two records leaves no room for doubt that the District Judge was incensed and imbittered. . ."

The words describe a condition, but there is no remedy.

In *United States vs. Davis*, 442 F.2d 72 (10th Cir. 1971), Judge Ritter in a non-Jury trial setting so intimidated a lawyer that all parties were deprived of an impartial judicial atmosphere. The matter was reversed. However *Davis* does not signal a trend or a change in the thinking of the Tenth Circuit. Because surely, any court which would read the transcript in *Davis* and the instant case would agree the conduct of the Trial Court in the instant case was worse than in *Davis*.

The Tenth Circuit in its opinions isolates the separate acts of the Trial Court in a chamber. The Court refuses to deal with the issue of the affect on the trial when Judge Ritter makes his presence felt. One can only suppose what Justice Adams must have thought when he was reading the transcript in *Davis*. The brevity of his opinion coupled with an inclusion of the appendix indicates the Judge's concern concerning the prejudicial effect of Judge Ritter's conduct.

If this Honorable Court determines it is proper to decide cases of this type by an incident by incident basis, then it is likely the same decision as the Appellate Court of Appeals will be reached. If however this Honorable Court believes judicial misconduct should be judged by taking the totality of same and measure its effect on the trial itself, then it is respectfully submitted Certiorari should issue in the instant case. The facts in *Davis* are not nearly as severe as in the instant case, but they were judged differently. In *United States v. Redmond*, 546 F.2d 1386 (10th Cir. 1977), the

Court isolated each item of misconduct. Alone, each one was not enough to make the trial unfair, but in total they were. The Tenth Circuit does not follow the totality theory.

The social implications of Judge Ritter's conduct is far beyond the legal community. In January, 1978, on nation-wide T.V., one of the more popular shows, *Sixty Minutes,* aired to the populace, the judicial misconduct of Judge Ritter. Petitioner did not receive a fair trial. His conviction was not reversed, because of the historical reluctance of the Judges of the Court of Appeals. Yet, the people of Utah and the United States must question why no action has been taken by this Court.

In the instant case, Judge Ritter expressed opinions of the Defendants' guilt. He denied to make pre-trial rulings on pre-trial motions. He made comments following the Jury's verdict, and in fact raised the bond of Petitioner in front of the panel. (See *United States vs. Latimer,* 548 F.2d 311 (10th Cir. 1977)). The Judge assumed the role of prosecutor and Judge. The Judge injected evidence into the trial, and when not satisfied with the evidence submitted by the prosecution, he questioned the witnesses to obtain more. Who in this atmosphere would object to Judge Ritter or even try to oppose him in any regard? Certainly not the lawyers who practice in Salt Lake City, as the transcripts of all the manifold appeals to the Tenth Circuit will show. The lawyers are frightened of Judge Ritter. He in effect will excommunicate them from the federal court system in their district. [Cf. *United States vs. Latimer,* 548 F.2d 311 (10th Cir. 1977); record on appeal *United States vs. Latimer,* P. 596-97; *United States vs. Smith,* 495 F.2d 668 (10th Cir. 1974); and *United States vs. Cartwright,* ____ F.2d ____ no. 76-1017 (10th Cir., March 9, 1977)].

The Solicitor General in Appendix One has cited the instant case as one of the examples in support of their Petition To Remove Judge Ritter from trials in which the United States is a party. The Solicitor General asserted, "*. . . F. Respondent refuses to consider pre-trial motions until after jeopardy has attached.*" Miscarriages of justice result. To that point the United States has argued, *inter alia,*: "This Court

condemned that position in *Appawoo.* It is, unfortunately, not an isolated incident. Similar examples include ******United States vs. Rio de Oro Mining Co.,*** CR-74-52; . . ."[3]

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Petitioner's conviction was affirmed in an opinion which is contradictory to a prior, but somewhat isolated opinion, in the Tenth Circuit, *United States vs. Davis, supra.* The opinion is also in conflict with decisions of other circuits concerning conduct which is relatively similar, but not as severe as the instant case. See *Young vs. United States,* 346 F.2d 793 (D.C.C.A. 1965), *Burnsten vs. United States,* 395 F.2d 976 (5th Cir. 1968) and *Johnson vs. United States,* 356 F.2d 680 (8th Cir. 1966). Please also see *Judges as Tyrants,* H. Schwartz, Crim. L. Bull. 7:129, March, 1971 at p. 132.

CONCLUSION

There is a need for Certiorari to issue because of the public concern and need involving the conduct of Judge Ritter. Although it must be emphasized the Judge as an individual or his honesty is beyond reproach. It is his judicial temperament and inability to control his personal feelings during the course of the administration of justice to the citizens of the United States that is questioned. One may wonder as to the cause, but "why" is not relevant to the question presented to this Court. What is relevant is whether or not your Petitioner received a fair trial. He, like countless others did not receive a fair trial because of the conduct of the Trial Court. The Supreme Court must issue its Writ so that it may exercise its supervisory authority in the administration of courts as well as to achieve justice for this Petitioner. The Solicitor General has stated the administration of justice has broken down in the central division of the District of Utah. The Solicitor General has stated to the Tenth Circuit *inter alia,* as follows:

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[3] Petitioner's co-defendant.

Thus there is no functioning federal court for civil cases of tax summons enforcement, no functioning federal court for misdemeanors and petty offenses, and, in a very real sense, no functioning court for felony cases.

"We do not impugn respondent's capacity or honesty as a judge. Our concern, rather, is that he has become a law unto himself. He invents and follows his own rules, he is swayed by his own preconceptions of legal procedure, and is determined that no outside force – not the arguments of counsel, not the holdings of this (Tenth Circuit) Court – shall interfere with the conduct of his court. He feels no responsibility to the litigants to explain or justify his decisions. He brooks no argument and does not tolerate even well-mannered oppositions to his views. He attempts to make his decisions in such a way that this (Tenth Circuit) Court will be unable to correct his errors. We do not believe that a judge so disposed should be permitted to continue to bear primary responsibility for the administration of justice in Utah federal courts."

PETITIONER agrees and respectfully requests this Honorable Court issue its Writ of Certiorari.

Respectfully submitted.

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 75-1767, 75-1781, 75-1782

UNITED STATES OF AMERICA, Appellee, v. VIRGIL REDMOND, CARL POWERS, FRANCIS LUND, Appellants.	Appeal From The United States District Court For The District of Utah Central Division (D. C. # CR-74-52)

Herbert W. DeLaney, Jr., Salt Lake City, Utah (Richard J. Leedy, Salt Lake City, Utah, on the Brief), for Appellant, Virgil Redmond.

Sumner J. Hatch, Hatch, McRae & Richardson, Salt Lake City, Utah, for Appellant, Carl Powers.

Walter R. Ellett, Murrah, Utah, for Appellant, Francis Lund.

Richard W. Beckler, Attorney, Criminal Division, Department of Justice (Ramon M. Child, United States Attorney, and Ronnie L. Edelman, Attorney, Criminal Division, Department of Justice, with him on the Brief), for Appellee.

Before LEWIS, Chief Judge, BREITENSTEIN and SETH, Circuit Judges.

SETH, Circuit Judge.

The defendants, Virgil Remond, Carl Powers, and Francis Lund, together with a corporate defendant, were charged under 15 U.S.C. §§77q(a) and 77x with the use of the mails in the fraudulent sale of securities. The case was tried to a jury, and each defendant was found guilty on eight counts. The court sentenced the individual defendants to a total of eighteen years. Each defendant was also fined $40,000.00.

The Government sought to prove that the defendants engaged in a scheme to defraud investors by selling stock following various mergers between Rio de Oro Mining Company and other corporations controlled by the defendants, or some of them. The Government also sought to show a scheme to defraud buyers of Rio de Oro stock by false representations as to a coal lease on Indian lands, as to coal reserves, and as to a power plant. These representations were made in an investment publication, Univest, and by taking potential investors to the mine location. The Government sought to prove that fraudulent representations and false publications were also made as to a joint venture between Rio de Oro and CM[I], another corporation controlled by the defendants, as to gold and uranium mining and mineral reserves. As to the "sale" aspect of the Government's case, its witnesses testified as to distribution of stock by the defendants to nominees and the transfer of shares to persons in exchange for goods and services. The Government witnesses testified to the sale by the defendants of some 5.4 million shares of stock.

On this appeal the defendants raise several points as to pretrial events which will be first considered. They also urge as error a number of matters which concern what they consider to be an excessive participation by the trial judge in the questioning of witnesses, and as to statements made by the judge in the presence of the jury, which they assert exceeded proper comment. The defendants raise several other issues as to the admissibility of evidence, instructions, motions during trial, and the sentences received.

I.

The defendants argue that the delay was excessive between the time the events took place, which serve as a basis for the charges, and the date of the indictment. Reliance is placed on United States v. Marion, 404 U.S. 307. The defendant Redmond acknowledges that the court in *Marion* did not directly decide the issue. The Court did however there hold that before consideration be given to preindictment delay, it must be shown to have been deliberately caused by the prosecution to gain a tactical advantage. We do not consider that the decision in *Marion* is here applicable in the absence of an indication that the delay was intentional. The issue is also without substance because the statements as to prejudice are conclusionary only. *See* United States v. Hauff, 395 F.2d 555 (7th Cir.). We considered the standards in United States v. MacClain, 501 F.2d 1006 (10th Cir.), and the showing here made does not meet the requirements therein stated.

II.

The defendants also urge that they were denied a speedy trial. The standards are now well established and, of course, include prejudice to the defendant, and the length and reason for the delay. Strunk v. United States, 412 U.S. 434; Barker v. Wingo, 407 U.S. 514; United States v. Latimer, 511 F.2d 498 (10th Cir.); United States v. Goeltz, 513 F.2d 193 (10th Cir.); United States v. Mackay, 491 F.2d 616 (10th Cir.).

The period of time between the date of the indictment and trial was seventeen months. The principal cause of delay in the prosecution of the case came about from the necessity of starting extradition proceedings to return defendant Lund from Canada. He did return in January 1975, and his counsel entered his appearance in March. It was necessary that the codefendants be tried together and no other defendants then objected to the Lund delay. There was a delay of eight months thereafter. There were problems with a crowded calendar and illness of the judge; however, a substantial part of the delay arose from the pretrial motions filed by the

defendants. Some thirty motions were considered, and this procedure caused much delay. These were extraordinary motions. There were no motions filed for a speedy trial until the motion of defendant Redmond to dismiss. This was filed very shortly before trial.

The defendants assert as to particular facts causing prejudice that a witness had died before trial, and certain documentary materials was not available because of the delay. However, there is no assertion that an attempt was made to obtain the corporate records, and the defendants were free on bond before trial. As to the deceased witness, the record shows that he died before the indictment was handed down.

We find no basis for the objection to lack of a speedy trial.

III.

The defendants urge that the prosecution by special attorneys, and their appearance before the grand jury, was not authorized. The Attorney General through his delegate appointed the special prosecutors, and special experience was required. We find no basis for the objections raised to this use of special prosecutors under 28 U.S.C. §515(a). United States v. Katz, 535 F.2d 593 (10th Cir.).

IV.

The trial judge actively questioned the prospective jurors and excused a substantial number. He excused those with certain stockholdings, generally those employed by the Government, and any who were acquainted with any of the attorneys. These exclusions we cannot say were arbitrary or were excessive. They did not in any way result in a lack of a fair trial nor with a jury not impartial by destroying the initial selection under the Jury Selection Act. The trial judge acted with the discretion to be exercised in the jury selection procedure. United States v. Porth, 426 F.2d 519 (10th Cir.).

V.

We have carefully examined the rulings on evidence complained of by the defendants, and we find no reversible error. The defendants complain also of the manner in which the rulings were made, and the comment by the trial judge which accompanied the rulings. These comments will be considered hereinafter. These trial rulings include those as to the Government witness Litchfield, who was apparently excused. Defendants had expected to use him but had not subpoenaed him. The trial judge acted within his discretion in not delaying the trial to permit the defendant to obtain the presence of this witness. We also considered the hearsay testimony of a deceased witness which was offered and excluded, and found no error.

VI.

The appellants urge as error the refusal of the trial court to grant motions for acquittal as to certain counts. This objection is basically an argument that there was not evidence that defendants were "sellers" or themselves sold some of the securities in question, or they were not "sellers" as to certain count transactions.

The record shows that the large number of shares, over eight million, which were issued following the merger of Rio de Oro with Midwest Petroleum Company and Tiger Oil Company went in large part to nominees who endorsed the certificates, and returned them to the defendants who disposed of them for their own accounts. There was also testimony that shares were issued to persons who sold them for the defendants for a percentage of the sales price.

Shares were also transferred or issued to individuals in exchange for goods and services. There is ample evidence to meet the statutory elements. The showing of the general scheme, with sales of stock generated by defendants, together with the use of the mails, is sufficient. United States v. Mackay, 491 F.2d 616 (10th Cir.).

The trial court considered the evidence in the standard applicable, and correctly refused the defendants' motions for judgment.

VII.

The defendants further object to certain instructions given to the jury. They first point out that the court gave all the instructions requested by the Government. This cannot be, of itself, a valid objection. Obviously if the instructions given are each correct and in all cover the issues tried, there can be no objection as to their source.

The court clearly instructed as to the use of the mails, and emphasized the need by the Government to show such use in furtherance of the scheme. United States v. Mackay, 491 F.2d 616 (10th Cir.).

The defendant Lund urges that he was only acting as attorney for Rio de Oro. The record shows however that his participation was an active one, and not as an attorney for the firm. This evidence was sufficient to warrant the refusal of the instructions he tendered as to mistake of law or fact by an attorney.

The defendant Redmond urges that the court should have given the instructions he requested on good faith and on withdrawal from the activities. The good faith defense was included in the general instructions given, and we must conclude that the matter was adequately covered. As to the fact that defendant Redmond was displaced as president of Rio de Oro, this did not provide a sufficient basis for an instruction that he had withdrawn. There was other evidence that his activity continued in a lesser capacity. We find no error in the refusal by the trial court as to the requested instructions. We must conclude that the defendants have shown no error in the instructions given or refused.

VIII.

The defendants assert that at the time they made their closing arguments, they were not aware of the court's ruling on instructions. We do not find such a violation of Rule 30 of the Rules of Criminal Procedure as to warrant a reversal. There is no showing by the defendants that they made their closing arguments with any expectation that certain instructions would or would not be given. There is nothing in the

record to demonstrate that a request was made for a ruling before argument. In short, there was an acquiescence in the trial court's delay which delay was contrary to Rule 30. The situation is thus not comparable to that presented to this court in Delano v. Kitch, 542 F.2d 550 (10th Cir.). *See also* United States v. Cardall and Golden Rule Associates, ____ F.2d ____ (10th Cir.) (Tenth Circuit Nos. 75-1768 and 75-1780); United States v. Pommerening, 500 F.2d 92 (10th Cir.); Whitlock v. United States, 429 F.2d 942 (10th Cir.); Downie v. Powers, 193 F.2d 760 (10th Cir.).

IX.

The defendants refer to many places in the record where they assert that the participation of the trial judge in the examination of witnesses was excessive to a point that it interfered in their conduct of the trial. They also urge that in these same incidents, and by comments made when ruling on the admission of evidence, the trial judge disclosed his view that the defendants were guilty.

The record does show a very extensive questioning of witnesses by the trial judge, as in many instances the questions and answers extend over two to four pages of the transcript. The questions by the trial judge are directed to the development of a certain point. Also the questions serve to emphasize by repetition the testimony as to certain incidents or events. We have examined the places in the record referred to on this point by the several defendants and other portions of the record. These have been considered as to their cumulative effect on the trial, and together with the other points urged by the defendants. We find no reversible error.

The trial judge commented at several places during the four-day trial when he ruled on the admissibility of evidence. These comments, urged as error by defendants, and as adding to a cumulative unfairness, were within bounds in that they did in fact explain the ruling made. The comments, in most instances, refer to the participation in the scheme by the several defendants, and as to the admissibility of testimony referring to the acts of only a single defendant. The explanation for the court's ruling was a variation on a

conspiracy doctrine, which was proper. The rulings perhaps did not need the kind of explanation they received, but we find no error, either as to individual incidents or as to their cumulative effect on the fairness of the trial. The same conclusion must be reached as to the restrictions on the arguments and questioning of witnesses by the attorneys. *See* United States v. Davis, 442 F.2d 72 (10th Cir.); Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir.).

We have recently considered in United States v. Cardall and Golden Rule Associates, ____ F.2d ____ (10th Cir.) (Tenth Circuit Nos. 75-1768 and 75-1780), similar arguments as to the fairness of a trial. That opinion also refers to Whitlock v. United States, 429 F.2d 942 (10th Cir.), and United States v. Mackay, 491 F.2d 616 (10th Cir.). The three cases referred to above also involve trials conducted by the trial judge who tried this case. We said in the *Golden Rule* case that the comments taken as a whole did not destroy the fairness of the trial. When the standards in the above cited cases are applied, we must say here that the case before us comes close to the line, but is still within permissible bounds.

X.

The individual defendants were each sentenced, as described above, to a total of eighteen years on the several counts and each defendant was fined $40,000.00. The defendants urge that the sentences are excessive, and show that the trial judge was prejudiced against them. We also considered the issue of excessive sentences in the *Golden Rule* case and the same conclusion must be reached here. The sentences are within the statutory limits and the Court of Appeals does not modify sentences. *See also* United States v. Mackay, 491 F.2d 616 (10th Cir.), and United States v. Sierra, 452 F.2d 291 (10th Cir.).

AFFIRMED.

APPENDIX B

AFFIDAVIT

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, VIRGIL S. REDMOND, being put on my oath depose and state as follows:

On the morning of my trial in the case of the United States of America v. Virgil Redmond et al., I was informed by my attorney Richard Leedy that he was not prepared to go to trial, but that the case would not go to trial as the government attorneys intended to request a continuance. The government attorneys did not receive a continuance and Richard Leedy then said to me: "I am not prepared, for trial, but neither are they; so what the hell!" The only documents that Mr. Leedy had with him were the copies of the motions that he had filed. He had not subpoened a single witness, and neither did any of the attorneys for the other defendants, and this was in spite of the fact that I had given him at least a dozen names of witnesses who would verify my testimony and my theory of the defense.

I had furnished Richard Leedy with absolute documentary proof, a book published by the University of Utah – College of Mines and a United States Geological Survey which showed the potential value of the mine in question and these books were not only not mentioned, or introduced into evidence, but when I asked Mr. Leedy about the books at the time of the trial, he stated: "I can't find the books and it does not matter." These books, completely refuted the allegations of the government as to the invalidity of the defendant's statements concerning the mine.

Richard Leedy, had not made any preparation for trial, and as a result was completely unprepared and, therefore, unable to refute the government's contentions. He did not call one single witness, did not discuss my testimony, with me, and would not let me testify.

Richard Leedy had repeatedly informed me that the case would be continued or dismissed and would not go to trial and as a result there had been no preparation for trial.

Richard Leedy told me that about two-thirds of the attorneys, in Salt Lake City, could not practice before Judge Ritter because the Judge had thrown them out of his Court and that he, Richard Leedy, had to be quite careful that he not irritate the Judge in any way as he, then, would not let Mr. Leedy practice in Judge Ritter's Court and this would be just like taking away Mr. Leedy's license to practice in the Federal Court.

Richard Leedy also said that if he got Judge Ritter mad that the Judge would throw him in jail as the Judge had done this with other attorneys.

During the entire time that I was represented by Mr. Leedy, he repeatedly told me that he could not do or say certain things, in my defense, as he had other matters before Judge Ritter and if he got the Judge mad it would cause him to rule against Mr. Leedy on the other matters.

Mr. Leedy, repeatedly, told me that he would feel out the Judge, *"when they were at the club, drinking"* and would then *"find out his feelings on the motions"* that were then contemplated or filed.

Richard Leedy, and the other attorneys, were in such abject terror, of Judge Ritter, during the entire proceedings that their main concern was to not aggravate the Judge.

Judge Ritter, during the trial, repeatedly, in front of the jury as well as outside of the presence of the jury threatened the attorneys, the witnesses and all participants as well as the spectators. (One attorney, who was a spectator, was removed from the court room and questioned for wearing dark glasses and the attorney apologized for wearing dark glasses in Judge Ritter's Court.)

The entire attitude in the court room was oppressive, intimidating and threatening and the questioning, by Judge Ritter, of the witnesses was extensive and intimidating and

done in such a manner to convey to the jury that Judge Ritter considered the defendants guilty.

Both the government attorneys and the defendants' attorneys informed the court that the trial would take approximately three to four week and Judge Ritter said "It will take three or four days" and the defendants' attorneys were afraid that they would give the appearance of prolonging the trial and cut short even their questioning of witnesses.

Just prior to closing arguments the defendants' attorneys, and the defendants, had a conference in the halliway. The main concern of the attorneys was what they could say, in their closing arguments, without being held in contempt of court and being put in jail by Judge Ritter. One of them said: "I will go as far as I can go, even though it will, probably, be only a few sentences but when he tells me to sit down and shut up, I will do it because I am not going to spend thirty days in jail for contempt.

On the morning that the hearing was to be heard, concerning the government threatening witnesses, my attorney, at the time, Richard Leedy, was so frightened of the trial judge, Judge Ritter that he stopped at a bar, on the way to court and consumed three double shots of whiskey. Only after he had consumed the three double shots of whiskey did Richard Leedy have the courage to argue the Motion. After drinking the three double shots Richard Leedy was in such a comotose state that he forgot to call the witness involved, one Leo G. Bateman, who was ready, willing and able to testify that when he was called before the Grand Jury that the government attorneys did not like the way that he was testifying and they stopped the proceedings and in the presence of the Grand Jury went off the record and told Leo Bateman that they would indict him for perjury in another case, that involved the nephew of Leo Bateman, if he did not testify in the manner that the government attorneys desired.

I could not change attorneys because it is difficult, in Salt Lake City, to get an attorney that will appear in front of

Judge Ritter and I had paid all my life savings, and all of the monies that I could borrow to Mr. Leedy.

Immediately prior to the trial, Judge Ritter had helped the Judge's niece purchase an automobile from the witness, George Koroulis, who was in the automobile business. Mr. Koroulis had been given immunity by the government and when George Koroulis testified that defendant Powers had threatened him and Mr. Leedy objected as to Virgil Redmond, the demand, by Judge Ritter, that the testimony be repeated to the jury and his statements about the witness being a respected businessman was based upon the Judge having personal business dealings, of a self serving nature with the witness.

FURTHER AFFIANT SAYETH NAUGHT!

DATED this 7th day of January, 1977

/s/ VIRGIL S. REDMOND

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

The above named Virgil Redmond personally appeared before me and after being put upon his oath swore to and testified that each and every statement in the above Affidavit is completely true of his own knowledge.

/S/ Boyd M. Fullmer
NOTARY PUBLIC – Residing in
Salt Lake County, Utah

My Commission Expires:
7-29-77

APPENDIX C

AFFIDAVIT

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, DOUGLAS W. LITCHFIELD, being put upon my oath depose and state as follows:

In the case of the United States of America vs. Virgil Redmond et al., I had previously discussed the testimony that I would give, if called as a witness, and after giving the government's prosecuting attorneys this information they excused me that I could leave and need not return unless contacted further by the United States attorneys. I was not contacted further by the prosecution. I was contacted by the defense attorneys and I agreed to testify as a defense witness. The estimate was that the trial would take three or four weeks. I was in Gold Creek, Montana when I received a phone call from one of the defense attorneys asking me to appear the next day. I had people in from various areas, including Stamford, Connecticut and I rescheduled the meeting with them for 7:30 a.m. so that I could catch a plane to Salt Lake City. I was at the Butte, Montana Airport and I called Salt Lake City to let the attorneys know when I would arrive and I was informed that it was too late, that the case had gone to the jury.

My Resume is attached and if called, as a witness, I would have testified, as an expert witness, who has personally observed the Red Creek Mine, as follows:

That the mine would support a power plant according to the book: *Eastern and Northern Utah Coal Fields*, by H. H. Doelling and R. L. Graham, published by the Utah Geological and Mineralogical Survey affiliated with the College of Mines and Mineral Industries, University of Utah, Monograph Series #2, of 1972 and this is also my opinion.

Further, my personal observations and the source, mentioned hereinabove, would prove that:

1. The coal was a steam grade coal with an average of one (1%) sulphur.

2. That the coal reserves are extensive, mineable and would have carried a reasonable on-site program.

3. That the mine could have been an open pit type mine as well as an underground type mine.

4. That the coal seam was from twenty-five (25) feet to sixty-three (63) feet and this makes recovery, by open cut methods, economically feasible for a portion of the deposit. The balance would be recovered by underground methods.

5. That the two hundred acres under direct lease by Rio De Oro was the key to the acquisition of Federal Leases of the surrounding coal lands and, therefore, was extremely valuable. This is due to the step-out leasing policies of the Federal Government.

6. The Red Creek Mine had been opened and roads had been constructed and the mine was ready to be put into production.

7. There is extensive material, including photographs of the mine, on pages 281 through 321 (Pictures on 291, 306, 315) of the Doelling and Graham book. This book is considered the very best work on mines in the area where the Red Creek Mine is located and is always used as the final source of information concerning mines in the area. The book should have been introduced into evidence.

8. On site, at the Red Creek Mine was a great deal of equipment including D9 Caterpillar Bulldozers, with Rippers and a 275-A-Michigan Front End Loader. The approximate costs of the on-site equipment, at the time of trial, would have been Three Hundred Thousand Dollars ($300,000.00).

9. Virgil Redmond had asked me to make a truthful, accurate estimate of the value of the Red Creek Mine, and I would not have made any other kind, and my expert opinion is that the Red Creek Mine is, and was, a valuable, economically feasible, mineable mine and as the demand for coal, and energy, increased the value of the mine would increase.

10. I would further have referred to a booklet known as U.S. Geological Survey Bulletin 471 entitled: "The Blacktail (Tabby) Mountain Coal Field, Wasatch County, Utah" Lupton C.T. 1912. This document contains detailed information which would have been extremely valuable to the defense. Copies of this document and the Doelling and Graham book were in the possession of Richard Leedy, attorney for Virgil Redmond and by themselves would have refuted the government's contentions as to the Red Creek Mine.

FURTHER AFFIANT SAYETH NAUGHT!

SIGNED this 12th day of January, A.D. 1977.

/S/ DOUGLAS W. LITCHFIELD

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

The above named Douglas W. Litchfield personally appeared before me and after being put upon his oath swore to and testified that each and every statement in the above Affidavit is completely true of his own knowledge.

NOTARY PUBLIC – Residing in
Salt Lake County

My Commission Expires:
November 20, 1978

APPENDIX D

UNITED STATES DISTRICT COURT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,	)	
VS.	)	CASE NO. CR 74–52
RIO DE ORO MINING COMPANY, VIRGIL REDMOND, CARL POWERS, FRANCIS LUND, DEFENDANT.	)	

AFFIDAVIT

STATE OF UTAH)
: SS
COUNTY OF)

JOAN MARTINDALE, HAVING BEEN FIRST SWORN ON OATH DEPOSES AND SAYS:

1. Affiant is a resident of Iron County, State of Utah, and was formerly a resident of Salt Lake City, Salt Lake County, State of Utah.

2. In the fall of 1975, I was served a suppoena to testify, as a witness for the United States in the Case of Rio De Oro Mining Company, Virgil Redmond, Carl Powers and Francis Lund.

3. On the first day of the Trial, Pursuant to the instruction of the United States Attorney, I appeared in the Courtroom of Judge Willis W. Ritter, the presiding Judge. After some delay, all witnesses were requested to respond to a roll call, after which we were instructed by Judge Ritter about our conduct as witnesses during the trial. Judge Ritter

instructed us that we could not remain in the Courtroom not in the hall, but had to be placed in a witness room and would be held there until the trial was completed. Judge Ritter instructed us that during the trial we were not to talk to other witnesses or defendants, or anyone else, regarding our testimony or the trial. Specifically, Judge Ritter instructed all witnesses that we were not to talk to other witnesses or anyone else during the Trial. And that during or after we were called as witnesses and that a Marshall would supervise us during the trial. We were then taken to the witness room.

4. While in the witness room, I observed most, if not all, of the witnesses discuss with the other witnesses their testimony. They discussed and compared their individual testimonies with the other witnesses both before and after they testified.

5. I was asked about and discussed my testimony with several other witnesses both before and especially after I appeared on the stand. We all rallied around and supported each other because of the bad treatment we all received as witnesses by Judge Ritter.

6. The discussions of each others testimony took place every day of the trial.

7. During all the times there was a Marshall present in or around the witness room and he did not object to nor prohibit the discussions.

8. During the trial, Judge Ritter's attitude toward all witnesses was very abusive. His attitude toward me personally, as a witness, was very insulting and all witnesses felt the same and discussed it in the witness room. In fact, the witnesses were so upset about the way they were treated by Judge Ritter, that they contacted the local newspapers and an article appeared in the newspaper, about the third day of the trial, outlining the complaints of the abuse and inconsiderate attitude of Judge Ritter toward the witnesses in this trial. The article stated how the witnesses were in effect being held captive during the trial.

9. During the preliminary comments by the Judge, at the start of the trial, and prior to our being locked up in the witness room, I was very startled at the arbitrary attitude of Judge Ritter and his blatant disrespect toward the attorneys, witnesses and spectators. He was very insulting to the attorneys and as I watched him I became very apprehensive because I realized I had to testify before him.

10. In talking to the witnesses in the witness room, everybody commented about Judge Ritter's conduct and the insulting and abusive manner in which he treated everyone in his Court, especially the attorneys and witnesses.

11 Affiant does and did at said time of being called as witness, object to the treatment of the Witness by the Attorney's for the Government and the way they covered up pertinent testimony that may have helped the defendants.

12. Affiant does and did at said trial object to the way the trial was handled and that it was indeed fair and just, this conclusion is based on conversations that she did in fact overhear and that she will be willing to testify too.

13. Affiant admits that she contacted the Attorneys for the defense, voluntarily, and offered to make the above statement, and that Affiant made same honestly and to the best of her recollection and belief, and Affiant had not received any promises nor consideration for making said statement.

FURTHER AFFIANT SAYETH NOT.

/s/ Joan Martindale

Sworn and Subscribed to before me this 26th day of April, 1977.

/s/ Paul F. Beatty
Notary Public
Residing At: Cedar City, Utah 84720

My Commission Expires:
11-7-79

77-1080

NO. _____

In the Supreme Court of the United States

October Term, 1978

VIRGIL REDMOND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX ONE TO THE PETITION FOR WRIT OF CERTIORARI, VIRGIL REDMOND, PETITIONER

LEVINE AND PITLER, P.C.
Robert L. Pitler
1150 Delaware Street
Denver, Colorado 80204
Registration No. 1139

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No.

UNITED STATES OF AMERICA,
Petitioner.

vs.

HONORABLE WILLIS W. RITTER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
Respondent.

IN THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

No.

IN THE MATTER OF THE DIVISION OF)
BUSINESS AND ASSIGNMENT OF CASES)
IN THE UNITED STATES DISTRICT)
COURT FOR THE DISTRICT OF UTAH)

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

PETITION FOR ORDER REASSIGNING CRIMINAL PROCEEDINGS AND CIVIL PROCEEDINGS INVOLVING THE UNITED STATES

WADE H. McCREE, JR.
Solictor General
Department of Justice
Washington, D.C. 20530

RAMON M. CHILD
United States Attorney
200 Post Office and Courthouse Bldg.
350 South Main Street
Salt Lake City, Utah 84101

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No.

UNITED STATES OF AMERICA ,

Petitioner,

vs.

HONORABLE WILLIS W. RITTER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,

Respondent.

IN THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

No.

IN THE MATTER OF THE DIVISION OF)
BUSINESS AND ASSIGNMENT OF CASES)
IN THE UNITED STATES DISTRICT)
COURT FOR THE DISTRICT OF UTAH)

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

PETITION FOR ORDER REASSIGNING CRIMINAL PROCEEDINGS AND CIVIL PROCEEDINGS INVOLVING THE UNITED STATES

The United States of America respectfully requests this Court to issue a writ of mandamus requiring respondent Honorable Willis W. Ritter to take no further action in any criminal proceeding pending in the District of Utah. The United States also requests the Judicial Council of the Tenth Circuit to issue an order directing the following:

(1) No criminal proceedings henceforth filed or instituted in the United States District Court for the District of Utah be assigned to the Honorable Willis W. Ritter for any action whatsoever;

(2) All criminal proceedings currently pending in the Central Division of the District of Utah be reassigned to another judge or judges designated by the Council;

(3) A judge or judges designated by the Council shall hereafter have full control over and responsibility for the call, service and discharge of grand juries, the assignment and duties of the magistrate, the return of indictments, arraignments, cases under the Federal Juvenile Delinquency Act, complaints for the apprehension of material witnesses, probation revocation proceedings, trials in criminal cases, sentencings and all other criminal proceedings in the Central Division;

(4) No civil proceedings henceforth filed or instituted in the United States District Court for the District of Utah in which the United States, or any agency or officer thereof, is a party be assigned to Honorable Willis W. Ritter.

JURISDICTION

I

The jurisdiction of this Court to grant the writ of mandamus or prohibition is invoked pursuant to the All Writs Act, 28 U.S.C. §1651. The writ properly issues to correct persistent abuse of discretion, *Bankers Life & Casulty Co. v. Holland*, 346 U.S. 379, 383 (1953), and extends in such cases

to "supervisory control of the District Courts by the Courts of Appeals . . . necessary to proper judicial administration in the federal system." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957). *See also United States Board of Parole v. Merhige*, 487 F.2d 25, 30 (4th Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); *United States v. Hughes*, 413 F.2d 1244, 1248-49 (5th Cir. 1969), *vacated as moot sub nom. United States v. Gifford-Hill-American, Inc.*, 397 U.S. 93 (1970); *United States v. Dooling*, 406 F.2d 192, 198 (2d Cir.), *cert. denied sub nom. Persico v. United States*, 395 U.S. 911 (1969); *Sanders v. Russell*, 401 F.2d 241, 244 (5th Cir. 1968); *Rapp v. VanDusen*, 350 F.2d 806, 810 (3d Cir. 1965); *United States v. Ritter*, 273 F.2d 30, 32 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960).

Extraordinary writs are "freely employed 'to prevent disorder from a failure of justice,' " *United States v. Malmin*, 272 F. 785, 789 (3d Cir. 1921) (quoting from *Rex v. Baker*, 3 Burr. 1265), and to prevent improper and undesirable behavior of a district judge "highly deleterious to the sound administration of criminal justice." *United States v. Dooling*, *supra*, 406 F.2d at 199.

II

The jurisdiction of the Judicial Council of the Tenth Circuit is invoked pursuant to 28 U.S.C. §332(d). That section grants the Judicial Council "broad powers . . . in seeing that the District Court's business is conducted effectively, expeditiously and in a manner that inspires public confidence." *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1103 (10th Cir. 1972). *See also Chandler v. Judicial Council*, 398 U.S. 74, 121-125 (1970) (Harlan, J., concurring).

INTRODUCTION

Chief Judge Ritter was appointed to the district court in 1949. At least in recent years he has conducted his judicial business in a manner that is inimical to the standards of judicial conduct that ought to be observed. As this Court is well aware, he has been unable to agree with his fellow judges

about the allocation of judicial business, and the Judicial Council has been required to intervene.[1] The Supreme Court has criticized respondent for intemperate and obstreperous conduct,[2] and this Court on many occasions has found it necessary to rebuke the Judge for violations of the established norms of judicial conduct,[3] for improper behavior,[4] for deliberate misuse of his judicial powers to thwart justice,[5] for

[1] *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100 (10th Cir. 1972) (*en banc*); Orders of the Judicial Council of the Tenth Circuit dated January 20, 1968; May 24, 1965; and December 20, 1971, *In the Matter of the Division of Business and Assignment of Cases in the United States District Court for the District of Utah. See* Appendix at pp. 1-17.

[2] *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 142-143 (1967) (respondent "did the opposite of what our prior opinion and mandate commanded"); *United States v. Jorn*, 400 U.S. 470 (1971).

[3] *United States v. Peterson*, 456 F.2d 1135 (10th Cir. 1972) (characterizing respondent's conduct of a criminal trial as "a clear-cut example of judicial abuse of the most basic elements of procedural due process"); *see also United States v. Bray*, 456 F.2d 851 (10th Cir. 1976); *United States v. Davis*, 442 F.2d (10th Cir. 1971).

[4] *United States v. Barney*, 550 F.2d 1251, 1254-55 (10th Cir. 1977) ("... this is an instance where [respondent] ordered the government, on three working days notice to be ready to proceed to immediate trial on twenty-three cases under pain of dismissal if the government was not thus ready to proceed. Such was utterly unreasonable and constitutes a gross abuse of discretion on the part of the trial judge."); *United States v. Cardall*, 550 F.2d 604 (10th Cir. 1977), *petition for cert. pending*, No. 76-6696.

[5] *United States v. Appawoo*, 550 F.2d 1242, 1244 (10th Cir. 1977) ("[T]he court had refused to hear the [pretrial] motions before trial, as required by Rule 12, Fed. R. Crim. P., in the absence of any showing or reference in any manner whatever to good cause for deferring a consideration and ruling. We must take notice of the practice of [respondent] to hear pretrial motions after the jury has been sworn ... [T]here are references in the records to show that this is

evident bias against the United States,[6] and for ignoring orders of the Tenth Circuit.[7]

Proper relations between the district judges and the attorneys for the United States are important if public justice is to be achieved, especially in criminal cases. Relations between respondent and the United States Attorney's office

[5] Continued.
done to prevent appeals by the government on rulings on such motions." The court went on to cite other cases in which it had directed respondent, without apparent effect, to discontinue this practice. It then held that the "trials" being conducted were shams, contrived by respondent for the purpose of avoiding appellate review of decisions that he knew to be contrary to established Tenth Circuit Law. Notwithstanding this decision, respondent has continued the practice of deferring rulings on pretrial motions until after the empanelling of a jury. *United States v. Radmall*, indictment dismissed on August 25, 1977, *appeal pending*, No.

[6] *United States v. Ritter*, 540 F.2d 459 (10th Cir.) (*en banc*), *cert. denied sub nom. Olson Farms, Inc. v. United States*, 429 U.S. 951 (1976); *United States v. Ritter*, 273 F.2d 30 (10th Cir.), *cert. denied* 362 U.S. 950 (1960); *United States v. Hatahley*, 257 F.2d 920 (10th Cir. 1958). *Cf. Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1361 (10th Cir. 1977); *Eckles v. Sharman*, Nos. 75-1434 and 75-1435 (10th Cir., decided February 3, 1977) (removing respondent for improper conduct and bias in private cases).

[7] In addition to *Appawoo, supra, see United States v. Fay*, 553 F.2d 1247, 1248, 1250 (10th Cir. 1977) ("It is apparent that the failure of [respondent] to conform to the rules by refusing to hear the motions to suppress at the prescribed time frustrated the proper trial of these defendants .... The procedure here followed by [respondent] obviously aborted a proper consideration of the motions to suppress, [which respondent granted without hearing evidence.] ... [Because the Double Jeopardy Clause bars a second trial,] we cannot evaluate the correctness or significance of the ruling on the motion to suppress by reason of the failure to follow the procedural rules.")

have deteriorated significantly during the last few years. For example, after this Court issued a writ of mandamus instructing respondent to discontinue using a "trailing calendar" system under which numerous cases were called for trial on short notice,[8] respondent harshly criticized the United States Attorney for obtaining the writ and indicated that if he could not try cases in his usual way, insofar as possible he would avoid trying them at all. Since then respondent has called very few cases for trial; many criminal cases have been pending beyond the time provided by the Speedy Trial Act, and many of those cases continue to be pending even after the completion of the trials respondent conducted in July and early August of this year. In the few cases Judge Ritter has set for trial, respondent has reverted to his "trailing calendar" system.

Respondent refuses to follow the clear commands of a multitude of federal rules, the specifics of which are set forth in the Statement of Facts. For example, in criminal cases he refuses to allow witnesses who did not testify at the preliminary hearing to testify at trial; he refuses to conduct the proceedings required by Fed. R. Crim. P. 11 prior to accepting guilty pleas; he refuses to honor the prosecutor's request for a jury trial in felony cases, despite the clear language of Fed. R. Crim. P. 23(a); he refuses to issue compulsory process for obtaining non-testimonial evidence; he prohibits parties from negotiating plea agreements authorized by Fed. R. Crim. P. 11(e); he refuses to permit the magistrate to hold trials in petty offense cases, yet obstructs the prosecution of such cases in his court. In sum, he has exhibited great hostility toward the approved ways of dealing with and trying criminal cases.

It has become difficult, if not impossible, to vindicate in respondent's court "the public's interest in fair trials designed to end in just judgments."[9] When respondent holds criminal

[8] *United States v. Ritter*, No. 76-1917 (10th Cir., mandamus issued November 6, 1976). *See also United States v. Barney*, *supra*.

[9] *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

trials, he postpones decisions on suppression requests or motions to dismiss until jeopardy has attached, thus frustrating the United States' statutory right to appeal; he grants or denies such motions without hearing testimony, on occasion without hearing argument by the government, and usually without entering any factual findings; in most cases he refuses to permit opening statements; he refuses to follow the Federal Rules of Evidence; his demeanor in court destroys the solemnity of the proceedings and brings the administration of justice into disrepute; his abrupt and procedurally irregular decisions sometimes thwart the completion of ongoing trials, and, in many instances, the Double Jeopardy Clause bars reprosecutions.[10] His behavior in court harms criminal defendants no less than it harms the United States, because his conduct often makes it impossible for either party to obtain a fair trial.[11]

The United States has, over the past two years, vigorously resisted some of respondent's excesses It has taken appeals in many cases and, when necessary, has sought writs of mandamus and orders of the Judicial Council. The United States has, for example, sought and obtained a writ of mandamus requiring respondent to hear and dispose of pretrial motions at least ten days prior to trial. It has sought and received an order removing respondent from an antitrust case for evident bias. It has sought a writ of mandamus requiring respondent to convene a regular grand jury and allow it to sit in accordance with the established rules of law. When respondent subsequently convened a grand jury, this Court nevertheless retained jurisdiction over the balance of the government's petition. After the grand jury had been convened, it was necessary to obtain a supplemental order directing respondent not to interfere with its conduct. The United States also sought and obtained a writ of mandamus to require respondent to give adequate notice of the dates on

[10] *See, e.g. United States v. Jorn*, *supra*; *United States v. Fay*, *supra*.

[11] *See, e.g., United States v. Peterson*, *supra*; *United States v. Smith*, 495 F.2d 668 (10th Cir. 1974).

which criminal cases will be tried and to set such trials for dates certain.

Furthermore, there are now pending before the Judicial Council of this Circuit requests by the United States (1) for an order granting trial authority to the United States Magistrate in petty offense cases and establishing a system for the forfeiture of collateral in lieu of appearance for persons committing certain petty offenses in the District of Utah, and (2) for an order directing respondent to allow his court reporter to transcribe proceedings in open court after respondent has, apparently, confiscated the original records of remarks hostile to the United States and to the Court of Appeals.

These proceedings have been and will continue to be of some assistance. But they cannot be truly effective so long as respondent continues to exercise arbitrary and erratic authority in individual cases. The power of a trial judge is too great and the opportunities for abuse of that power too frequent to allow effective appellate supervision in the run of cases, when a judge is determined to act by his own lights. The effective administration of criminal justice in the Central Division of the District of Utah has been paralyzed by respondent's chronic disregard for accepting legal norms and his unwillingness or inability to meet the demands of his office. We have, therefore, reluctantly concluded that a piecemeal approach will not effectively cope with the problems that beset his court.

In light of these circumstances the United States files this petition, which asks this Court to remove Judge Ritter from further participation in federal criminal cases and to reallocate the business of the District of Utah so that no new federal civil cases are assigned to Judge Ritter. Because the propriety of this relief depends in substantial measure on an understanding of the way in which Judge Ritter carries out his judicial duties, we devote the bulk of this petition to a discussion of the various aspects in which his conduct persistently fails to meet accepted legal norms.

STATEMENT OF FACTS

The discussion that follows is drawn from cases tried by respondent during the last several years. Each of the sections is illustrated with one or more examples of respondent's conduct during this time. It would have been possible to provide additional examples (or to expand the time to include additional cases), but we believe that this sampling of relatively recent cases provides a foundation for understanding the way in which respondent handles judicial business.

I

RESPONDENT CONDUCTS HIS BUSINESS IN A WAY THAT EXCEEDS HIS AUTHORITY AND BRINGS THE FEDERAL COURTS INTO DISRESPECT.

A. Respondent mismanages the grand jury.

Respondent's handling of the Central Division grand jury has been extensively documented in the government's petition filed in *United States v. Ritter*, No. 76-1331 (10th Cir., filed April 20, 1976), in which the United States sought a writ of mandamus based upon (1) the refusal to convene a grand jury upon request by both defendants and the government, (2) the untimely and abrupt discharge of past grand juries, (3) the strict limitation on the scope of grand jury inquiry, and (4) the refusal to sign and enforce immunity orders obtained in accordance with law.[12] Under the threat of action posed by the filing of that petition, respondent reluctantly summoned a grand jury to appear on May 10, 1976, and at the present this Court continues to retain jurisdiction over the petition pursuant to an order dated April 29, 1976 (App. 59-60).

This Court's retained jurisdiction has been invoked once.[13] This Court directed respondent to vacate his order

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[12] The Petition for Writ of Mandamus is included in the Appendix at pp. 18-58.

[13] A Supplementary Petition for Writ of Mandamus was filed on August 10, 1976, and is included in the Appendix at pp. 61-66.

preventing an appearance before the grand jury by an attorney from the Department of Justice and to allow the grand jury to proceed forthwith in hearing such cases as that attorney and the United States Attorney might desire to present to it. *United States v. Ritter*, No. 76-1331 (10th Cir., Sept. 10, 1976) (App. 67-68).

B. Respondent refuses to permit witnesses to testify at trial who did not testify at the preliminary hearing.

If the government calls a witness at trial who did not testify at the preliminary hearing and the defense objects, respondent excludes that witness's testimony. If the government is unable to prove its case without such testimony, respondent dismisses the case. These mid-trial rulings are effectively unreviewable by this Court.

Such rulings contravene Fed. R. Crim. P. 5.1(a). By requiring that a defendant be held to answer upon a finding of probable cause by the magistrate that may be ". . . based upon hearsay evidence in whole or in part," that Rule contemplates that the government will offer additional testimony at trial to show more than probable cause and to supplant hearsay, without regard to whether the testimony comes from a witness who appeared at the preliminary hearing. Since the preliminary hearing involves only a showing of probable cause, there is no reason to ban trial testimony not presented at the preliminary hearing.

The nature and consequences of respondent's practice are illustrated in the following excerpts from transcripts in criminal proceedings before him.[14]

Respondent has described his practice as a rule requiring full disclosure of all of the government's evidence at the preliminary hearing (App. 71):

> THE COURT: Now any criminal lawyer worth his salt protects his client in the right to the preliminary hearing, the right to have all the evidence disclosed at the preliminary hearing, and the right not to have any evidence produced against him at the trial that wasn't produced against him at the preliminary hearing.

[14] Transcripts showing the full context of all quotations in the Statement of Facts are contained in the separately-bound Appendix.

United States v. Smith, CR-33-73, *reversed on other grounds, United States v. Smith*, 495 F.2d 668 (10th Cir. 1974), *aff'd following retrial*, 527 F.2d 692 (10th Cir. 1975). Yet Fed. R. Crim. P. 16 squarely establishes that defendants have no such right to full discovery. *See Weatherford v. Bursey*, 429 U.S. 545, 559-561 (1977).

During a calendar call for setting trial dates in 26 cases pursuant to a writ of mandamus issued by this Court in *United States v. Ritter*, No. 76-1917 (10th Cir., Nov. 6, 1976) (App. 293-294), respondent again explained his practice. When government counsel in *United States v. Shields*, CR-76-37, asked for ten days' notice of trial, and stated the number and location of the witnesses he required, Judge Ritter ruled that the government would be limited to the witnesses it produced at the preliminary hearing (App. 79-80):

> THE COURT: Have you had a preliminary hearing on this matter?
>
> MR. DAHL (Defense counsel): Yes, Your Honor.
>
> . . . .
>
> THE COURT: Did they have their witnesses at the preliminary hearing?
>
> MR. DAHL: They had three, I believe.
>
> . . . .
>
> MR. DAHL: That was all.
>
> THE COURT: Well, gentlemen, I think that you are stuck with evidence you produced at the preliminary hearing. The rule about that is the Government is obliged to produce at the preliminary hearing all of its evidence that it expects to introduce at the trial.

At the trial in *United States v. Scavo*, CR-76-40, respondent barred the government's first witness from testifying when the defense showed on voir dire that the witness had not testified at the preliminary hearing (App. 96-97):

MR. HANSEN: (Defense counsel): Excuse me, may I ask a question on voir dire?

THE COURT: Sure.

. . . .

MR. HANSEN: Did you testify at the preliminary hearing?

THE WITNESS: No, I didn't.

MR. HANSEN: Then I would object to his testifying here, Your Honor.

THE COURT: Counsel.

MR. BOYACK: (Asst. U.S. Attorney): I know of no requirement that requires –

THE COURT: Step down.

MR. BOYACK: – that the witness at the trial to have testified at the preliminary hearing.

THE COURT: All right, that is why he's here I suppose. The objection is sustained.

At the arraignment in *United States v. Beers,* No. 77-1011 (10th Cir., July 6, 1976), respondent also made it clear that outright dismissal can be expected if the government fails to produce all of its witnesses at the preliminary hearing. (App. 104):

> THE COURT: Well, she's (the defendant) had a preliminary hearing. The Government is required to produce all their witnesses and if you don't do it, the Magistrate should dismiss the matter and if the matter comes here after your failure to produce all the witnesses before the Magistrate, I dismiss it for that reason alone . . . .

In the midst of a complicated gambling trial in *United States v. Quarry,* Nos. 77-1175, 77-1176, 77-1177 and 77-1178 (10th Cir., appeal filed Feb. 9, 1977), the government attempted to offer the testimony of five witnesses who had not testified at the preliminary hearing. The testimony was barred and the government was not allowed to argue the point. The following transpired when the first of these five witnesses took the stand (App. 138-39):

MR. SNARR (Asst. U.S. Attorney): We will next call Mr. David MacKay as a witness.

. . . .

MR. MITCHELL (Defense counsel): Your Honor, at this time I will make an objection on behalf of my client, David Russo, in that this witness was not called to testify by the Government at the preliminary hearing. And it constitutes a surprise to me. As a matter of fact, I have in the past represented Mr. MacKay. And for the Government to call Mr. MacKay when they didn't call him at the preliminary hearing and in view of the fact that I, in fact, have represented him in the past, might very well involve a conflict of interest between myself representing Mr. MacKay and my representing David Russo. And the Government didn't call him at the preliminary hearing.

THE COURT: You said that three times. What about that?

Mr. SNARR: Your Honor, he was not, at the time of the preliminary hearing, identified as a witness. He was not called.

THE COURT: Well, you can't put anything on here that you didn't produce at the preliminary hearing. That's the law.

MR. SNARR: Your Honor the rule –

THE COURT: The Government must produce all of its evidence at the preliminary hearing. And it will not be permitted at the trial to produce any evidence it didn't show to the defendants at the time of the preliminary hearing.

MR. HANSEN (Defense counsel): We join in that motion, Your Honor.

THE COURT: Yes.

MR. SNARR: Your Honor, I do have legal argument I would like to present to the Court.

THE COURT: You have what?

MR. SNARR: A legal argument I would like to present to the Court.

THE COURT: Well, you do that sometime, maybe, if we ever need it. Step down.

The court likewise barred the next four witnesses from testifying. When the prosecutor explained that these witnesses had not testified at the preliminary hearing because their involvement in the case was discovered later, and that their names had thereafter been available to defense counsel at all times, respondent stated that a second preliminary hearing should have been held at which the additional witnesses should have been required to appear (App. 143-44):

> THE COURT: You ought to have had a preliminary hearing and given the defendant an opportunity to examine them in order to prepare for the defense.
>
> MR. SNARR: Your Honor, we have had our case file open to the defendants. We have also gone through a –
>
> THE COURT: That isn't what the law requires. You are required to present your case before the magistrate at a preliminary hearing at which time you show the defendant everything you have. That is what is required. Everything you have. And the purpose of that is to give him an opportunity to prepare his defense. Of course, if the magistrate, after looking at all the evidence, decides that you haven't made a case of probable cause of a commission of a crime by this defendant, why, he will throw you out of court.
>
> . . . .
>
> Now that procedure requires the production of all the evidence that you intend to present. That preliminary hearing gives the defendant a very important right. And that right is to see all the evidence against him, no surprises.

Largely as a result of the suppression of these witnesses' testimony, the court granted motions for judgment of acquittal in favor of two defendants for insufficient evidence. This case, in which the jury convicted four other defendants who were then granted judgments of acquittal notwithstanding the verdicts, is now on appeal to this Court for reasons not related to the rulings discussed above.

On other occasions respondent has actually required multiple preliminary hearings. In *United States v. Smith*,

supra, he did so in an effort to dissuade the defendant from exercising his right to be charged by indictment. At the arraignment the following exchange took place (App. 70-73):

> THE COURT: Did you talk to him (the defendant) about how he wants to be charged?
>
> MR. NORTON (Defense counsel): He states that he does not wish to waive indictment.
>
> THE COURT: Is he in custody?
>
> MR. SNOW (Asst. U.S. Attorney): No, Your Honor.
>
> THE COURT: Well, I will give him 15 minutes to think that over.
>
> . . . .
>
> THE COURT: Did you ever attend a preliminary hearing, counsel?
>
> MR. NORTON: Yes, I have, and we have had a preliminary hearing in this matter, Your Honor.
>
> MR. SNOW: He has already had a preliminary hearing.
>
> MR. NORTON: That's right.
>
> . . . .
>
> MR. NORTON: Your Honor, based on the Court's statement that no other evidence will be used at trial than at the preliminary hearing –
>
> MR. SNOW: I was unaware of that. I understood the rule to be that the only thing permissible is reliable –
>
> THE COURT: The Court is telling you you had better hold another preliminary hearing. You are new here. I am telling you. You see what you find out if you take a little time. I am going to send this man back for a preliminary hearing, and we will have you in Friday a week from today at 2:00 o'clock in the afternoon.
>
> . . . .
>
> THE COURT: And you are going to have error in this record if you don't show him all your evidence at that preliminary hearing.
>
> MR. SNOW: Your Honor –
>
> THE COURT: Don't be arguing with the Judge.

MR. SNOW: I don't intend to argue.

THE COURT: That is a poor way to commence your service around here.

A second preliminary hearing was duly held.

Respondent's requirement of full disclosure of the government's evidence at the preliminary hearing conflicts with the discovery procedures of Fed. R. Crim. P. 16 *See also Gerstein v. Pugh*, 420 U.S. 103, 114-116, 119-125 (1975); *Weatherford v. Bursey, supra.* [15] Because respondent's practice of excluding evidence that was not presented at the hearing leads either to enlarged hearings or judgments of acquittal, it is effectively unreviewable by this Court even though a pattern of abuse has been established.

C. Respondent refuses to permit indictment of a defendant who has previously been discharged by a magistrate.

When the government obtained an indictment in *United States v. Beers, supra,* after discharge of the defendant by the magistrate, respondent summarily dismissed the indictment. The prosecutor cited Fed. R. Crim. P. 5.1(b), which explicitly allows such an indictment, to Judge Ritter, who made the following ruling (App. 108):

THE COURT: What is your motion?

MR. BEECROFT (Defense counsel): To dismiss (the indictment), Your Honor.

THE COURT: Well, it's already dismissed. I sustain the dismissal of the Magistrate.

MR. WHEELER (Asst. U.S. Attorney): Your Honor, the Magistrate has no authority to dismiss the indictment. Is the indictment dismissed?

THE COURT: Well, the indictment is dismissed because she's been twice in jeopardy.

[15] The requirement also conflicts with 18 U.S.C. § 3060(e) which provides that no preliminary hearing shall be required after indictment or after an information has been filed.

MR. WHEELER: Your Honor, there was no jury sworn in this case.

THE COURT: All right, don't argue with me about it. That's the ruling, prepare the order.

Respondent so ruled even though this Court had already instructed respondent (1) that prosecution is allowed on an "... indictment returned subsequent to the dismissal by a magistrate of a complaint based on the same facts and circumstances as the indictment"; (2) that "... if an indictment is fair on its face and properly returned, the trial court cannot look behind the indictment to determine if it is based on inadequate or incompetent evidence"; and (3) that a preliminary hearing subsequent to indictment is an "... invasion of the province of the grand jury." *United States v. Kysar,* 459 F.2d 422 (10th Cir. 1972).

Even prior to *Kysar* this Court told respondent on petition by the Government for a writ of mandamus that his practice of having preliminary hearings after indictment where they had not been held earlier was "unwarranted in view of our decision in Swingle v. United States ... and the authorities cited in note 2 ... showing that preliminary hearings are not required or necessary after indictment." Accordingly, the Court stated, "we cannot agree that such practice of the Court is proper." *United States v. Ritter,* No. 442-70 (10th Cir., mandamus denied Nov. 13, 1970).[16]

D. Respondent does not follow the procedures prescribed in Fed. R. Crim. P. 11(c) and (d) for accepting guilty pleas.

The transcript of the arraignment conducted on May 8, 1975, in *United States v. Cartwright,* No. 76-1017 (10th Cir., Mar. 9, 1977), provides an example of respondent's procedure for accepting guilty pleas (App. 151-52):

THE COURT: Do you waive the reading?

[16] A copy of the Court's unpublished per curiam opinion is reproduced at App. 109-13.

MR. SMITH (Defense counsel): We will waive the reading, Your Honor.

THE COURT: Ready to plead?

THE CLERK: How do you plead to the information; guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Are you pleading guilty of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: No one influenced you or pushed you?

THE DEFENDANT: No, Your Honor.

THE COURT: All right.

MR. WHEELER (Asst. U.S. Attorney): Your Honor, the maximun penalty is $1,000 or one year.

THE COURT: Very well, get a presentence.

This Court reversed the judgment and sentence in *Cartwright*, stating:

> It is obvious that the court made no real attempt to satisfy the requirement of Rule 11 before accepting the plea of guilty. Although the question was not raised on appeal, our study of the record convinces us that the failure of the trial court to comply with the requirements of Rule 11 constitutes such plain error affecting substantial rights of the accused that we cannot ignore it.

Again, in *United States v. Bradshaw*, CR-75-8, the entire proceedings at arraignment were as follows (App. 156-58):

MR. WHEELER (Asst. U.S. Attorney): This is a maximum penalty of $1,000 [blank].

THE COURT: Do you want to waive the reading?

MR. SMITH (Defense counsel): Yes.

THE COURT: Are you ready to plead?

THE CLERK: Steven Maycock, how do you plead to Count 1?

DEFENDANT MAYCOCK: Not guilty.

THE CLERK: Count 2.

DEFENDANT MAYCOCK: Guilty.

THE COURT: Count 1 you are pleading not guilty.

DEFENDANT MAYCOCK: Yes, Your Honor.

THE COURT: Count 2 you plead what?

DEFENDANT MAYCOCK: Guilty.

THE COURT: All right, what about you?

THE CLERK: Eddie Bradshaw, how do you plead to Count 1?

DEFENDANT BRADSHAW: Not guilty.

THE CLERK: To Count 2?

DEFENDANT BRADSHAW: Guilty.

THE COURT: All right. No one has persuaded either of you to enter a plea of guilty?

THE DEFENDANTS BOTH: No, sir.

THE COURT: You did that of your own free choice?

DEFENDANTS: Yes, sir.

THE COURT: All right, we will put you on the trial calendar.

When Maycock and Bradshaw later challenged the sufficiency of their guilty pleas on Count 2, Judge Ritter explained his approach to Rule 11 as follows (App. 162-63):

> THE COURT: Well, of course we don't read Rule 11 to them and tell them all about that. I don't like the fact that we didn't tell them that a prison sentence is possible. We didn't tell them the penalty. You started to and I interrupted you. You got part way and –

The amendment of Rule 11 in 1975 to expand the mandatory inquiry by the court into the defendant's understanding of his rights and the voluntariness of his plea has not altered respondent's practice of taking pleas without any real inquiry at all. For example, on June 3, 1977, the defendant's guilty plea in *United States v. Martinez*, CR-77-00045, was entered as follows (App. 115):

THE COURT: Take his plea.

THE CLERK: Richard Alex Martinez, what is your plea to the indictment as filed herein, guilty or not guilty?

MR. MARTINEZ: Guilty.

THE CLERK: He's entered a plea of guilty.

THE COURT: All right. We'll have a presentence report. He will be on the sentencing calendar.

Defendant's guilty plea in *United States v. Chidester*, CR-77-00044, was handled the same day in the same fashion (App. 118):

THE COURT: . . . are you ready to plead?

MR. EVANS (Defense Counsel): Yes, Your Honor.

THE CLERK: Brent J. Chidester, what is your plea to the indictment as filed herein, guilty or not guilty?

MR. CHIDESTER: Guilty.

THE CLERK: He's entered a plea of guilty.

THE COURT: All right. We'll have a presentence report and we'll have you on another calendar.

Another arraignment on the same calendar, which contained 83 matters to be considered on a single day, provides still another example of the same procedure for accepting guilty pleas. In *United States v. Lloyd*, CR-77-00049, the defendant's guilty plea was entered as follows (App. 121):

THE COURT: All right. What's your plea to this?

MR. LLOYD: Guilty.

THE COURT: Take his plea.

THE CLERK: Greg W. Lloyd, what is your plea to the petty offense information filed herein, guilty or not guilty?

MR. LLOYD: Guilty.

THE COURT: Pre-sentencing report. You're on another calendar.

Respondent's habitual procedure leaves all of his guilty plea cases open to automatic reversal (*McCarthy v. United States*, 394 U.S. 459 [1969]),[17] to the discredit of the criminal justice system and to the disadvantage both of defendants prejudiced by the procedure and the public interest in the finality of judgments (see *Blackledge v. Allison*, 97 S.Ct. 1621, 1627-1628 [1977]).

E. Respondent prohibits parties from negotiating plea agreements authorized by Fed. R. Crim. P. 11(e).

In *United States v. Paiz*, A-75-207M, Judge Ritter stated at the time of arraignment (App. 169):

THE COURT: Well I will tell you what, I want that practice [of negotiating and filing a written plea agreement] stopped right now. There will be no more filings of anything of this sort that you are about to read to me.

In *United States v. Lennox*, CR-74-19, Judge Ritter criticized the prosecutor for engaging in plea negotiations, which respondent erroneously presumed had taken place (App. 183):

There will be no plea in [this] case or in any other case in this court. If the district attorney files charges against people, he had better be prepared to come in here and try the case. We are not going to rush people into the penitentiary by getting them to enter a plea of guilty. I don't like that.

Rule 11(e) explicitly authorizes the making of plea arrangements: "[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. . . . Judges and prosecutors conserve vital and scarce resources. The public is protected from the

[17] Reversal is not automatic on collateral review. *See Davis v. United States*, 417 U.S. 333, 346 (1974); *DelVecchio v. United States*, 556 F.2d 106 (2d Cir. 1977); (collecting cases); *Hamilton v. United States*, 553 F.2d 63 (10th Cir. 1977), *petition for cert. pending*, No. 76-1818.

risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings." *Blackledge v. Allison, supra,* 97 S.Ct. at 1627. Respondent's refusal to allow plea agreements denies these and other benefits to defendants and the public, yet his practice is effectively immune from review by this Court.

F. Respondent refuses to consider pretrial motions until after jeopardy has attached.

It has long been respondent's practice in criminal cases to defer the hearing and determination of pretrial motions until trial. His failure to decide pretrial motions before trial violates both the letter and the spirit of Fed. R. Crim. P. 12(e). It leads to a need for a second unnecessary trial, and it may foreclose prosecution of the guilty if the Double Jeopardy Clause should bar such a trial.

In *United States v. Appawoo,* 553 F.2d 1242, 1244 (10th Cir., 1977), this Court remarked:

> There are references in the records to show that [Judge Ritter's practice of hearing pretrial motions after the jury has been sworn] is done to prevent appeals by the Government of rulings on such motions.

The references to which the Court referred include the following statements of respondent to a defense lawyer who had asked the court to consider his pretrial motion prior to trial (App. 187-88):

> THE COURT: . . . Now you are pushing your luck here. If I rule on this motion before you confront a jury and that constitutional question [raised by the motion] is litigated for the next ten years and goes up to the Supreme Court of the United States and in the meantime the Government amends [the information], you have done your client a great disservice, because there is no bar to him being prosecuted.
> . . .

> . . . I am going to do what I can to protect [the defendant] from his counsel, and we will just keep that right where it is and get a jury for you one of these days, and when we get the matter up before the jury we will get far enough down the way with the evidence to see what is involved and then we will entertain your motion. I don't want to be trying these cases again. I am interested in the court docket as much as I am the [defendant], but he ought to have the benefit of double jeopardy defense. If he is prosecuted once that ought to be enough.

This Court condemned that position in *Appawoo.* It is, unfortunately, not an isolated incident. Similar examples include *United States v. Fay,* 553 F.2d 1247 (10th Cir. 1977); *United States v. Dane,* CR-75-108; *United States v. Huffman,* CR-75-70; *United States v. Bates,* CR-75-101; *United States v. Rio de Oro Mining Co.,* CR-74-52; and *United States v. Lansing,* CR-75-120. In *Lansing,* the defendants filed pretrial motions to suppress evidence and to dismiss the information. The government filed a response, which also asked Judge Ritter to hear and rule on the motions prior to trial. When the Judge set the case for trial without hearing the motions, the government obtained a stay of proceedings from this Court and petitioned for a writ of mandamus.[18] This Court issued a writ directing Judge Ritter to decide and dispose of the pending motions at least 10 days before the trial or impanelling of a jury (App. 207-08). *United States v. Ritter,* No. 76-1011 (10th Cir., mandamus issued May 20, 1976). The issuance of that writ has not affected Judge Ritter's practice. *See United States v. Radmall,* CR-76-118, indictment dismissed August 25, 1977, *appeal pending,* No. , in which respondent refused to entertain a pretrial motion to dismiss the pre-accusation delay, empaneled the jury, and then dismissed the indictment before any evidence had been taken.[19] *See also United States v.*

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[18] The government's Petition for Writ of Mandamus is contained in the Appendix at pp. 189-206.

[19] These proceedings are clearly described in the docketing statement which is included in the Appendix at 209-10.

Wagstaff, CR-76-120, indictment dismissed July 19, 1977, *appeal pending*, No. , (mid-trial dismissal on the ground that indictment was defective on its face, despite the fact that Rule 12(a) requires such decisions before trial).[20]

Respondent disregards Rule 12 in other respects. For example, in *United States v. Jacobsen*, CR-76-6, defense counsel was permitted to make a motion to suppress a quantity of cocaine after the jury had received its instructions on the law and had retired to deliberate, even though (1) no cause was shown for departing from Rule 12(b)(3), which requires that a motion to suppress must be raised prior to trial, and (2) granting such an untimely motion would prejudice the government's right of appeal, in violation of Rule 12(e). Without making any factual findings on the motion *or* on the merits of the case, respondent granted the motion and acquitted the defendant (App. 245-59).

The failure to state essential factual findings on the record, as required by Rule 12(e) and the failure even to hold a hearing on motions requiring such factual findings, are common omissions by respondent and resulted in reversal in *United States v. Kay*, No. 76-1299 (10th Cir., June 23, 1976). In *Kay*, respondent granted a motion to suppress evidence without hearing any testimony and in the face of a strong argument by the government that the search in question was authorized under the "plain view" doctrine (App. 264-68). He made no findings of fact or conclusion of law. A similar procedure led to reversal in *United States v. Smith*, 495 F.2d 668 (10th Cir. 1974), yet respondent continues to grant or deny motions without evidence, argument, or findings.

These cases also illustrate respondent's disregard for Fed. R. Crim. P. 12(c), which provides for the filing and hearing of pretrial motions "... at the time of the arraignment or as soon thereafter as practicable . . ." Respondent has no formal rules of court and seldom sets a time for filing or hearing pretrial motions. As a result, motions are made orally, without notice, just prior to or during the trial. This practice

[20] Trial transcript reproduced at App. 211-44.

makes accurate resolution of the issues difficult and impedes the United States' exercise of its rights under 18 U.S.C. §3731. The practice of failing or refusing to set a date for the filing and hearing of pretrial motions also hampers motion practice under other rules, such as Fed. R. Crim. P. 12.2, the implementation of which is tied to the time set by the court for the filing of pretrial motions.

G. Respondent refuses to compel defendants to provide non-testimonial evidence upon proper motion by the government.

In *United States v. Quarry, supra*, the defendants were charged with operating a gambling establishment. Prior to the arraignment the government filed a written motion for an order compelling handwriting exemplars, together with a supporting memorandum of law. This is what happened at the arraignment (App. 128):

> MR. SNARR (Asst. U.S. Attorney): Your Honor, one other matter with respect to Mr. Quarry and Mr. Russo, the government has filed a motion with the Court for an order to compel handwriting exemplars. This is for analysis of certain requests of a printer to have football betting cards printed and the orders with the printer were in handwritten form. Through investigation we believe that either Mr. Russo or Mr. Quarry submitted this request to the printer as part of the illegal gambling business. We would request the Court to issue an order authorizing us to take handwriting exemplars of those two particular defendants.
>
> MR. HANSEN (Defense counsel): Your Honor, relative to –
>
> THE COURT: That is a violation of the Constitution of the United States.
>
> MR. HANSEN: Your Honor, we resisted this at the grand jury. They subpoenaed them for the same purpose and that was abandoned and now they are before you and we resist it now.
>
> THE COURT: Well, I certainly will not do that. That is contrary to the Constitution of the United

States to have a man come up and give you a thumb print so you can convict him. You are going to have to find your handwriting comparison somewhere else.

Respondent declined to entertain arguments. The prosecutor could have established the propriety of his requests under *United States v. Dionisio,* 410 U.S. 1 (1973), and *United States v. Mara,* 410 U.S. 19 (1973). Decisions of this sort by district courts are effectively unreviewable – if the defendant should be acquitted the prosecution could not appeal, and if he were convicted there would be no need to appeal.

H. Respondent mismanages his criminal trial calendar.

Respondent consistently violates the Speedy Trial Act, 18 U.S.C. §3161 *et seq.* and his court's own Plan for Prompt Disposition of Criminal Cases in the District of Utah by holding no criminal trials for extended periods and then setting large numbers of criminal cases for trial on a trailing calendar on short notice.

The seriousness of this problem is readily apparent. On December 12, 1975, the United States Attorney's office received notice of a trial calendar consisting of 23 cases to commence in three working days. Three of the first four cases involved approximately 100 witnesses. Because it appeared impossible to secure the presence of the necessary witnesses (an airline strike and the press of holiday traffic made travel difficult), the United States Attorney requested 21 days in which to complete service of subpoenas and travel arrangements. Respondent did not respond to this request; he called the cases for trial as announced. He dismissed four cases outright because the government's witnesses were not present. Notwithstanding the fact that one of these cases was No. 20 on the calendar, respondent stated: "The case is reached now," and then dismissed it. This Court reversed the dismissal of these four cases in *United States v. Barney,* 550 F.2d 1251, 1255 (10th Cir. 1977), holding that the manner in which the cases were calendared for trial "was utterly unreasonable and constitutes a gross abuse of discretion on the part of the trial judge."

Respondent set no criminal cases for trial from March 1, 1976 to October 5, 1976. During that period the United States Attorney filed with respondent a request to be given at least 15 days' notice of trial in criminal cases. Judge Ritter did not respond to that request.

On October 5, 1976, respondent gave notice that 50 cases would be called for trial less than four working days later. The United States filed a "Motion to Vacate Trial Calendar and to Set Criminal Case Trials for Days Certain or Weekly Calendars;" respondent did not respond to this motion. The United States then sought and obtained from this Court a writ of mandamus directing respondent to set each of the cases on the October 5, 1976, calendar for trial on a date certain with a minimum notice of 15 working days.[21] *United States v. Ritter,* No. 76-1917 (10th Cir., mandamus issued Nov. 6, 1976).

Respondent held no criminal trials between January and June, 1977. He continues to refuse to set trials for dates certain. He set 22 cases on four consecutive weekly calendars beginning July 5, 1977, but no case was set for a date certain.[22] On July 11, 1977, respondent converted these four weekly calendars to a general trailing calendar (see App. 298). In other words, respondent continues to follow a practice that this Court, after forbidding it by mandamus, called "utterly unreasonable and a gross abuse of discretion" (*United States v. Barney, supra,* 550 F.2d at 1255).

I. Respondent forces the government to consent to nonjury trial.

Respondent's view of the right of the government to insist on a jury trial is demonstrated by the proceedings in *United States v. Nakai,* CR-76-54, which went to trial December 16, 1976. At the beginning of the trial the defendant sought to waive jury trial. The prosecutor requested a jury trial,

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[21] The government's Petition for Writ of Mandamus and the Court's Order appear at App. 269-92.

[22] These calendars appear at App. 295-97.

pointing out that under Fed. R. Crim. P. 23(a) the holding of a bench trial requires the consent of the government. He stated three times that the government would not consent to the waiver. Nevertheless, the court proceeded to hold a bench trial, stating (App. 303-04):

> I think it's a disgrace for the government to stand up there and that he's going to require this court to have those 12 ladies and gentlemen of the jury subjected to that embarrassment [of trying a carnal knowledge case].
>
> . . . .
>
> Well, the right by trial of a jury runs in favor of the defendant, not the government. That rule is not really in point.

This ruling led the government to petition this Court for a writ of mandamus in *United States v. Ritter*, No. 77-1240 (10th Cir., writ denied April 22, 1977).[23] In denying the petition this Court stated (App. 354):

> By such denial of the petition, however, this Court does not approve the trial of criminal cases to a court without a jury except in cases where there is strict compliance with Rule 23(a) . . . [reciting Rule].

Since then respondent has on at least one other occasion stated his intention to hold a bench trial despite the government's objection. The violation of the rules was prevented then only because the defendant eventually pleaded guilty.[24] At all events, it seems clear that respondent does not intend to respect Rule 23(a), this Court's cautionary statement, or the Supreme Court's square holding on this very question in *Singer v. United States*, 280 U.S. 24 (1965).

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[23] The government's Petition for Writ of Mandamus is reproduced at App. 334-53.

[24] *See United States v. Straley*, CR-76-78. The Solicitor General authorized the United States Attorney to refuse to proceed to trial in this case and to suffer dismissal of the indictment, in order to obtain appellate review. That proved unnecessary in light of the plea of guilty.

J. Respondent is hostile toward the trial of misdemeanors and petty offenses in the district court, yet he refuses to permit magistrate trials and forfeiture of collateral in such cases.

Respondent's attitude regarding misdemeanor and petty offense prosecutions in his court has always been clear. This attitude, together with his refusal to permit a magistrate to try petty offenses or misdemeanors, means that such crimes cannot ordinarily be prosecuted in the Central Division of the District of Utah.

For example, in *United States v. Rasmussen*, CR-75-10 (illegal entrance on a military reservation), respondent made the following statements at the time of arraignment (App. 355-56):

> THE COURT: What kind of petty offense was it? We don't entertain those petty offenses up there on the reservation. How did that one get in here?
>
> . . . .
>
> I don't think this case will last very quick [sic]. I think it will go out the door with wheels under it.

Notwithstanding his objection to the handling of such matters in his court, respondent will not permit the United States Magistrate to handle them and will not permit the forfeiture of collateral in lieu of appearance in such cases. Although the United States petitioned the judges of the District Court for the District of Utah on May 11, 1976, for such relief and received informal approval from Judge Anderson, respondent has never responded to the petition. As a result, according to documents attached to that petition, an estimated 2,500 minor violations of federal law go unpunished in the State of Utah each year for want of an effective forum. Because of the impact of such a condition upon the effective administration of federal lands and reservations in Utah and upon public confidence in the federal court in Utah, the United States filed a Petition with the Judicial Council of the Tenth Circuit on March 28, 1977, asking the Judicial Council to establish a plan for magistrate trials and forfeiture of

collateral. Plans adopted in neighboring jurisdictions were proposed as alternatives. *In the Matter of the Trial and Sentencing of Minor Offenses by the United States Magistrate and Forfeiture of Collateral in Lieu of Appearance for Persons Committing Petty Offenses in the District of Utah*, No. 77-1208 (10th Cir. Judicial Council, docketed Mar. 28, 1977).[25]

At the call of an 83-case law and motion calendar on June 3, 1977, respondent demonstrated that his views had not changed. With regard to *United States v. Wise*, CR-77-00028 (unlawful use of an aircraft in a restricted area), he stated (App. 397):

> THE COURT: Another petty offense. We're up to big business here today. The district attorney's office up there is up to big business.

When *United States v. Chatwin*, CR-77-00032 (careless driving within a park), came on for arraignment, respondent said (App. 399):

> THE COURT: Rocky Chatwin. What a bunch of junk they have collected here today.

A further example is *United States v. Bonnette*, CR-77-00052 (hunting over bait), when respondent said (App. 404):

> THE COURT: . . . Now this is a great big offense, I'll tell you. This fellow is charged with hunting over unshucked corn. That's what he did. Damned if he didn't. He hunted over unshucked corn.

Respondent again made it clear on June 3, 1977, that he would not permit the Magistrate to deal with such matters (App. 419-20):

> THE COURT: Now they want me to — Mr. Wheeler, you know that. You fellows want me to have a magistrate, a lot of magistrates, have a magistrate at every crossroad near a national park so that you can enforce a law real fast down there, harass the citizens. You have enough law around town. They go out for a holiday with their families, and I think there's a better way to handle that sort of business than hauling them into court. And I thoroughly disapprove of that program. I've made my views known for some time and they're well known back in the Department of the Interior. They're also well known, in fact, to the members of Congress, also.

[25] The Petition is reproduced at App. 358-95.

The June 3, 1977, calendar is the subject of a Supplemental Petition to the Tenth Circuit Judicial Council filed by the United States on July 13, 1977.[26] Both the original and supplemental petitions are now pending in the Judicial Council.[27]

K. Respondent ordinarily refuses to permit the government to make an opening statement in criminal cases.

In *United States v. Hepworth*, CR-75-102, the prosecutor was rebuffed when he requested permission to make an opening statement in the trial of the defendant for willful failure to file employer's quarterly tax returns (App. 448):

> THE COURT: Proceed.
> MR. WARD: Thank you, Your Honor. Your

[26] Supplemental Petition is reproduced at App. 422-31.

[27] Respondent rarely allows petty offense cases to go to trial. In *United States v. King*, CR-77-25, dismissed August 5, 1977, *appeal pending*, No. _____, respondent dismissed the case without stating reasons. He has disposed summarily of other cases as well. *See, e.g., United States v. Wood*, CR-77-00048; *United States v. Rasmussen*, CR-75-10; *United States v. Kosec*, CR-75-98. Transcripts of Proceedings in *King*, *Rasmussen* and *Kosec* are collected at App. 432-46. The Transcript of Proceedings in *Wood* is reproduced at App. 410-21.

Honor, may I be permitted to make a brief opening statement?

THE COURT: Well, what is the nature of this case?

MR. WARD: This is a case, Your Honor, charging a willful failure to file employees [sic] [employer's] quarterly federal tax returns.

THE COURT: No, you may not make an opening statement. That is, a very simple matter. The witnesses will make clear what it is.

Likewise, the government was not permitted to make an opening statement in *United States v. Calloway*, No. 76-1162 (10th Cir., Sept. 14, 1977), in which two defendants were charged with interstate transportation of two stolen motor vehicles. As the trial began in that case on January 9, 1976, the following occurred (App. 454):

THE COURT: Proceed.

MR. WARD: Your Honor, may the government be permitted to make an opening statement?

THE COURT: No.

A further example is *United States v. Thompson*, CR-76-127, where respondent ruled as follows (App. 457-58):

MR. BOYACK: Your Honor, may I make an opening statement?

THE COURT: No. This is a simple case. Which case is this now?

MR. MITCHELL: United States v. William Wade Thompson, Your Honor.

THE CLERK: No. 22.

THE COURT: I want to be sure I'm looking at the right one. Trial of interstate commerce. You need to make a big opening statement about that — in execution of a scheme to defraud!

All right. You don't need any opening statement. Put your witnesses on.

Although the opening statement is an accepted part of our criminal procedure (*see, e.g., United States v. Dinitz*, 424 U.S.

600, 612 (1976) (Burger, C.J., concurring)), there is no effective redress for respondent's decision not to permit it.[28]

L. Once the witness exclusion rule is invoked, respondent refuses to permit the agent of the United States designated by the government's attorney as its representative to remain in the courtroom during trial if that agent may be a witness.

In *United States v. Quarry, supra*, a complicated gambling case, respondent made the following statement when government counsel attempted to invoke Fed. R. Evid. 615(2) to permit the government's case agent to remain in the courtroom during trial (App. 132):

THE COURT: Well, if you are going to call him as a witness, I don't want him in here hearing what the other witnesses have said, getting himself prepared to testify.

Respondent adhered to his ruling even though government counsel demonstrated that the presence of the agent was essential to the presentation of his case (App. 135):

THE COURT: Well, I think you have talked yourself right into an exclusion of this witness. He's not just an officer assisting you, he's a witness, a crucial witness you say, one whom you want to tie the evidence all together with, to sum it up for you. No, I don't think he should be here. All witnesses in this case, anybody who is going to be a witness in this case, will now leave the courtroom.

When defendant invoked the exclusion rule in *United States v. Scavo, supra*, respondent excluded the government's agent, refusing to allow the government to even argue Rule 615.

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[28] Respondent's practice is routine. In accordance therewith prosecutors now seldom even ask to make an opening statement.

MR. BOYACK (Asst. U.S. Attorney): I would ask that the case agent be allowed to stay in.

MR. HANSEN (Defense Attorney): We would object if he is going to be a witness.

MR. BOYACK: He is going to be a witness, Your Honor.

THE COURT: Well then, he's going out in the hall. Anybody that is going to be a witness ought to go out. . . .

MR. BOYACK: Your Honor, I would –

THE COURT: Just call your next witness.

MR. BOYACK: May I make an explanation?

THE COURT: No, you don't need an explanation. Call your next witness, put your evidence on. [App. 98-99].

Respondent's practice is forbidden by Rule 615, but he declines to listen to argument on the point. Here, as elswhere, his practice is unreviewable. If the jury acquits the case is over, and if it convicts the United States' grievance thereby becomes moot.

M. At trial respondent excludes or admits evidence without regard to the Federal Rules of Evidence.

We have collected several examples of respondent's unique practice concerning rulings on evidentiary questions.

1. In *United States v. Corbett*, CR-75-75 (willful failure to file income tax returns), the prosecutor attempted to introduce testimony by an Internal Revenue civil audit supervisor as to statements made by Corbett at a conference concerning Corbett's civil tax liability. The conference was requested by Corbett and conducted by a civil auditor. Statements at such conferences are admissible under Fed. R. Evid. 613 and 801(d) (2), and the Supreme Court's decision in *Beckwith v. United States*, 425 U.S. 341 (1976). Any exclusion, even if authorized, must be made before trial under Fed. R. Crim. P. 12(6) and (f). Nevertheless, respondent refused to submit the testimony even for the limited purpose of showing intent, because the auditor had not given warnings based upon *Miranda v. Arizona*, 384 U.S. 436 (1966).

THE COURT: Well, the statements that he made there in a civil conference may not be used here against him in a criminal proceeding. . . . The man is there in the government offices closeted with government investigators, revenue agents and they are taking down notes about it and it's a violation of the Fifth Amendment to use those statements that he made. It's a very difficult thing when we get down to a criminal trial to sort out what a revenue agent does when he's pursuing the civil liability of a taxpayer from what he discovers with respect to the criminal liability. Now if he's going to develop anything on the criminal liability side, he's got to give the Miranda warning. . . .

. . . .

Now that's the Miranda warning and that's what the Supreme Court of the United States has held an investigating agent must tell the fellow. Now it doesn't make any difference if he's there voluntarily. It doesn't make any difference that he is there at his own request. What is important is what is the agent examining him about. Now that's a particularly sensitive thing. When the man is there for interrogation about civil liability for 1970 and now you're using the statement that he made at that conference involving only civil liability in a criminal court, charging him with failure to file 1971 and 1972, you want to show that something he said at the conference about the 1970 situation shows his intent not to file '71 or '72 or perhaps any other year. Now that you may not do .....

MR. WHEELER: But there was not interrogation, Your Honor.

THE COURT: It doesn't matter whether there is any interrogation. . . . [App. 470-72].

Mid-trial rulings of this sort do not permit time for adequate argument and, of course, they abrogate the right of appeal conferred by 18 U.S.C. §3731. Such rulings are common in respondent's court (*see also* pages 30-34 *supra*).

2. In support of a charge of obstruction of justice in *United States v. Dane*, CR-75-108, the government offered in evidence tape recordings of telephone conversations between the defendant and one Newmeyer, who had given explicit permission to Treasury agents to intercept and record the conversations. After the government informed the Court that such interceptions are expressly authorized under 18 U.S.C. §2511(2)(c) (and their admissibility has been made clear by Fed. R. Evid. 401 and 801(d)(2), and by numerous cases[29]), respondent repeatedly criticized the government for perpetrating "another dirty trick," refused to permit government counsel to hand up the pertinent statute, suppressed the recordings on his own motion in mid-trial, and dismissed the case (App. 483-90):

> MR. WHEELER (Asst. U.S. Attorney: . . . There is a specific exception here, your Honor, for consensual interceptions by one of the parties to the conversation. If I might have a second to find that –
>
> THE COURT: This fellow didn't consent.
>
> MR. WHEELER: The other party did, though, your Honor.
>
> THE COURT: Well, that isn't going to get you anywhere.
>
> . . . .
>
> Now, this is a piece of dirty business. This is a dirty trick kind of thing.
>
> . . . .
>
> MR. WHEELER: May I have just a moment, your Honor? The statute is very long. It is in here.
>
> THE COURT: Well, you should be prepared on it.
>
> MR. WHEELER: There was no motion filed to suppress this, your Honor. We didn't anticipate it.
>
> THE COURT: Well, I file my own motions here. You are about to get a judgment of acquittal entered

[29] *See, e.g., United States v. White*, 401 U.S. 745 (1971); *United States v. Hall*, 536 F.2d 313 (10th Cir.), *cert denied*, 429 U.S. 919 (1976); *United States v. Quintana*, 457 F.2d 874 (10th Cir. 1972). *Quintana*, a decision controlling on respondent, was decided long before the proceedings in *Dane*.

> against you unless you can come up with something there. I don't see how you are going to come up with it. I don't believe there is a reasonable search within the meaning of the Fourth Amendment. I think it is an unreasonable search.
>
> . . . .
>
> . . . This is a sorry mess, just a sorry kind of mess.
>
> Whenever the government stoops to trickery, whenever the government agents do not act above board, honestly, openly, but decide to do things underhanded –
>
> Are you writing down something back there? You. I am talking to you, yeah.
>
> UNIDENTIFIED OBSERVER: No, I am not.
>
> THE COURT: It looked to me like you had a file in front of you there.
>
> UNIDENTIFIED OBSERVER: No, sir. I am just sitting, listening.
>
> THE COURT: All right. Reporters from any kind of news media are supposed to report to me before they come in here so I know they are here and I know who they are. We just don't let everybody come in here and take notes of what is going on.
>
> As a matter of fact, if you want to find out – if anybody wants to find out what took place, they can go to the court reporter and buy a transcript. That is what the court reporter is for. And they get it accurately.
>
> All right, I don't believe you have got any exceptions that covers this.
>
> MR. WHEELER: Could we pass the statute up, your Honor, and –
>
> THE COURT: No, you can't pass it up. The Government hasn't prepared its case and can't show me what it is.
>
> . . . .
>
> (Whereupon the following proceedings were had in the presence and hearing of the jury.)

THE COURT: Well, the Court is deciding this matter as a matter of law and entering a judgment of acquittal on that man. I don't believe that the Government of the United States should engage in tricks of this kind. And I think this is a violation of the Fourth Amendment of the Constitution of the United States to have a fellow's telephone bugged, two of them bugged.

He didn't know there was a Treasury Agent on the other end of the line. And I think that is in violation of an Act of Congress that forbids that type of bugging among others.

So the judgment will be a judgment of acquittal.[30]

3. In another jury case, *United States v. Young, et al.*, CR-57-132, respondent ruled *sua sponte* that a law enforcement agent working under cover should have given *Miranda* warnings to persons he encountered in his investigation, even though those persons were not in "custody" (see *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). Respondent barred the agent from testifying and refused to hear argument from the government. The following occurred in the presence of the jury when the undercover investigator was called as a witness (App. 493-97):

THE COURT: Why didn't you get a haircut before you came down here in my courtroom.

THE WITNESS: I should have, Your Honor.

THE COURT: My goodness, why did you bring him in here with his head in that shape?

MR. SNOW (Asst. U.S. Attorney): Well, Your Honor, he's a member of the bar and I hadn't noticed his hair until you mentioned it.

THE COURT: All right.

. . . .

[30] The entry of a judgment of acquittal was itself improper (but, again, not subject to review on appeal) since respondent had not found that evidence independent of the overhearing would be insufficient to convict. See Fed. R. Crim P. 29(a).

MR. SNOW: Would you state your name for the record please?

A. Larry Reed.

THE COURT: Don't ever appear in my court again with that hair uncut.

THE WITNESS: I won't, Your Honor.

Q. (By Mr. Snow): And your residence please?

THE COURT: This is a court of justice and we consider serious things here. We don't want any freak haircuts.

THE WITNESS: Yes, Your Honor.

. . . .

THE COURT: Now, I don't know why we are wasting our time on this. He's there as a decoy, he's undercover. He's going to get information there. If he isn't going to get information, then we are wasting our time on a double reason. He doesn't have a search warrant. He's obtaining information illegally.

MR. SNOW: Well, Your Honor, there is no motion before the Court.

THE COURT: Well, I have just taken care of it without a motion.

MR. SNOW: Well, he didn't seize any evidence. He had a conversation with one of the –

. . . .

MR. MOONEY (Defense counsel): We are going to object to the conversation on the grounds that he is acting in the capacity as an investigator from the Attorney General's Office and he fails to advise anybody of any rights.

THE COURT: Well, yes, that is what I am talking about.

MR. HATCH (Defense counsel): And further, the person he had a conversation with he can't identify, so any conversation or anything that arose from this has nothing to do with this case, it's hearsay.

MR. SNOW: He hasn't been given the opportunity to identify who he had the conversation with.

THE COURT: Any information he got representing himself to be something else than what he was is illegally obtained.

MR. SNOW: Your Honor, I would like to address that point if the Court will hear me.

THE COURT: Well, some other time you can address it. You step down. Call your next witness.

4. During a jury trial in *United States v. Hepworth, supra,* on January 6, 1976, the prosecutor attempted to impeach the testimony of a government witness, which conflicted with statements the witness made during a pretrial interview. Fed. R. Evid. 607 explicitly permits such impeachment. Defense counsel objected, and respondent sustained the objection during the following colloquy (App. 449):

MR. LEEDY (Defense counsel): Your Honor, I object to impeaching his own witness.

THE COURT: Sustained.

MR. WARD (Asst. U.S. Attorney): Your Honor, there has been a change in the rules of evidence which allow any party to impeach any witness, including its own.

THE COURT: Well, I will sustain the objection. I don't allow anybody to impeach his own witness. The rules of evidence in this Court haven't changed. I have been defying that rule for 27 years and it's a little late for me to have any change in it.

5. In *United States v. Owens,* CR-75-35, respondent permitted character testimony on behalf of the accused beyond the trait in issue, without the foundation required by Fed. R. Evid. 404(a)(1). The prosecutor attempted to explain the basis of his objection (which Fed. R. Evid. 103(a)(1) permits), but respondent did not allow an explanation (App. 502-03). He thereafter gave the following jury instruction (App. 504-05):

In this case there was a character witness, Alberta Henry. I don't know whether any of you people know Alberta Henry or have heard of her, but she is one of the most distinguished citizens of this state and one of the most honored citizens of this state. Many honors have been conferred upon her for her public service in

the interests of mankind. An honorable lady, a distinguished lady, came here and told us about this defendant. Now she didn't know anything about this offense. She wasn't offered to prove anything about the offense. She was offered as a character witness. Character testimony is admissible in these criminal cases to tell us what kind of a person the defendant is. Now Mrs. Henry, Alberta Henry, came here to give character testimony in favor of this defendant. I will say to you that the law of this Circuit is that that character testimony from that character witness, standing alone, is enough to create a reasonable doubt in your minds.

This amounted to an instruction to return a verdict of acquittal and exceeded the limits imposed by Fed. R. Crim. P. 29.

6. During the trial in *United States v. Hepworth, supra,* a former accountant for the defendant testified that he had prepared the employer's quarterly tax returns for the defendant prior to the periods in question. When he was asked who had the responsibility to file the returns, respondent refused to permit an answer on the ground that the question called for an opinion on the ultimate issue in the lawsuit. He would not allow government counsel to argue that such an opinion is admissible under Fed. R. Evid. 704 (see App. 450):

MR. WARD (Asst. U.S. Attorney): Who had the responsibility to file the Certified Manufacturing employer returns?

MR. LEEDY: Objection, Your Honor, that is the ultimate conclusion in the lawsuit.

THE COURT: Sustained.

MR. WARD: If I am not mistaken, Your Honor, the rules of evidence –

THE COURT: Never mind arguing the rules of evidence and that's final.

7. Respondent fails to conduct bench conferences on the record, and it consequently is difficult to document other improper evidentiary rulings. For example, in *United States v. Jacobsen, supra,* an off-the-record conference obscured a ruling barring evidence of a prior similar transaction to show intent to distribute cocaine. The transcript contains only the following: (App. 247):

> MR. WARD (Asst. U.S. Attorney): Was this the first time you had arranged for purchase of cocaine from Mr. Jacobsen?
>
> MR. HANSEN (Defense counsel): We will object to this as being immaterial.
>
> THE COURT: Sustained.
>
> MR. WARD: May we approach the bench, Your Honor?
>
> THE COURT: No.
>
> MR. WARD: I have a legal argument I would like to make, Your Honor, out of the presence of the jury.
>
> THE COURT: Well, at the first recess we have you make it. Go ahead with your argument – not your argument, go ahead with your examination.

Thereafter, but before the court next recessed, a bench conference was conducted; it is summarized in the affidavit of Brent Ward (App. 260-63). According to the affidavit, at the bench conference government counsel proffered evidence that two weeks prior to the acts charged in the information the defendant had distributed a quantity of cocaine. The government argued that evidence of prior similar transactions may be admitted for the purpose of showing intent, citing cases from several circuits. *See also* Fed. R. Evid. 404(b). When government counsel attempted to read from one pertinent case, respondent interrupted, stating that he "didn't care what any circuit courts had held; that it had been the rule in his court for 27 years that such evidence was not admissible and that he wouldn't permit it" (App. 262).

A similar ruling in *United States v. Hepworth, supra,* is contained in the appendix (App. 451-52).

N. Respondent fails to inform counsel of his proposed action upon requests for jury instructions prior to instructing the jury.

It is respondent's established practice to give jury instructions without any comment on the requests or his intentions. Fed. R. Crim. P. 30 unambiguously prohibits this practice (*see also Hamling v. United States,* 418 U.S. 87, 131-135 (1974)), and respondent's neglect often poses difficult questions that this Court must resolve concerning harmless error (*see, e.g., United States v. Cardall, supra,* 550 F.2d 604 [10th Cir. 1976], at 607). When this practice prejudices the government, the error is, of course, incurable.

O. Respondent often omits jury instructions on the elements of the offense, the language of the charge and the language of the pertinent statute, even after the government specifically requests that he give such instructions.

In *United States v. Foster, supra,* respondent simply ignored a request for essential instructions on the elements of the offense.

> MR. HANSEN (Defense counsel): We have no exceptions, your Honor.
>
> MR. WARD (Asst. U.S. Attorney): The government would request the court to instruct the jury on the elements of the offense and the statutory language.
>
> THE COURT: Get your exhibits ready. [App. 537]

The same thing occurred in *United States v. Owens, supra,* (App. 506):

> THE COURT: All right, you may take your exceptions to the charge.
>
> MR. MITCHELL: The defendant has no exceptions to the jury instructions, Your Honor.
>
> MR. WARD: The government has no exceptions, except we would suggest, Your Honor, that the Court

instruct the jury on the language of the offense, the elements of the offense and the definition of embezzlement.

THE COURT: There are some exhibits here. I will place the duty upon you folks to collect those exhibits. . . .

P. Respondent has denied the United States access to transcripts of public proceedings.

On May 18, 1977, in the course of a motion hearing in a civil case not involving the United States, respondent expressed his displeasure concerning (and threatened to sue) Chief Judge David T. Lewis, United States Attorney Ramon M. Child, Assistant United States Attorney A. Pratt Kesler, Utah Attorney General Robert B. Hansen, and United States Senators E. J. "Jake" Garn and Orrin Hatch. He also stated that there were "lesser fish to fry" and that he intended to "come out of [my] cave and fight back."[31] On that day and twice subsequently the United States Attorney sought a transcript of the proceedings in which these comments occurred, without avail. Respondent ordered his court reporter to turn over the stenographic notes in question to him and not to furnish transcripts of court proceedings without first obtaining specific approval from the judge. Respondent has failed to respond to a written request for the May 18 transcript.

On July 5, 1977, the United States filed a Petition with the Judicial Council for the Tenth Circuit, seeking an order permitting the inspection of the court reporter's original stenographic notes and vacating Judge Ritter's order restraining the court reporter from furnishing transcripts without his specific approval.[32] This petition is pending.

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[31] The United States has been informed of these statements by persons present in the courtroom. Because it has been unable to obtain a transcript of the proceedings, the United States cannot verify the accuracy of these reports.

[32] This Petition appears at App. 544-61.

Q. Respondent's precipitous actions in the courtroom impede the administration of justice.

In *United States v. Jorn*, 400 U.S. 470 (1971), precipitous action by respondent led to the discharge of defendants without trial. The Supreme Court held that although respondent abused his discretion in abruptly discharging the jury at the outset of the trial, reprosecution was barred by the Double Jeopardy Clause of the Fifth Amendment. The plurality opinion of Mr. Justice Harlan describes respondent's actions as follows at 486-87:

> Despite assurances by both the first witness and the prosecuting attorney that the five taxpayers involved in the litigation had all been warned of their constitutional rights, the judge refused to permit them to testify, first expressing his disbelief that they were warned at all, and then expressing his views that any warnings that might have been given would be inadequate. App. 41-42. In probing the assumed inadequacy of the warnings that might have been given, the prosecutor was asked if he really intended to try a case for willfully aiding in the preparation of fraudulent returns on a theory that would not incriminate the taxpayers. When the prosecutor started to answer that he intended to do just that, the judge cut him off in midstream and immediately discharged the jury. App. 42-43. It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial. *United States v. Perez*, 9 Wheat. 579, 580 (824). Therefore, we must conclude that in the

circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment.

Other, more recent examples of precipitous rulings include cases in which respondent: (1) granted motions to suppress evidence without hearing any evidence or making any factual findings,[33] (2) entertained a motion to suppress evidence after the jury had retired to deliberate, then suggested to defense counsel that the motion be changed to a motion for judgment of acquittal and granted the motion without examining the facts in evidence and without any factual findings,[34] (3) granted a motion to suppress evidence made orally at the time of trial because the government did not have a witness (whose testimony was immaterial both as to the motion and the charge) present in response to the motion,[35] (4) postponed rulings on pretrial motions until after jeopardy attached in order to prevent reprosecution,[36] and (5) while in the midst of trial on one count of an information, on his own motion ordered the defendant's guilty pleas on the second count withdrawn and dismissed both counts for failure of the government to offer sufficient evidence on the charge as to which the defendant had pleaded guilty (which, of course, was not in issue at the trial).[37]

A further instance of this aspect of respondent's official demeanor was his abrupt discharge of the Central Division grand jury on December 4, 1975, over the objections of the grand jury and the United States. The grand jury was then engaged in a continuing investigation into price fixing in the

[33] *United States v. Kay*, No. 76-1299 (10th Cir., June 23, 1976); *United States v. Smith*, 495 F.2d 668 (10th Cir. 1974). *See* pp. 33-34, *supra*.

[34] *United States v. Jacobsen*, CR-76-6, *see* pp. 33-34 *supra*.

[35] *United States v. Foster*, No. 77-1063 (10th Cir., appeal filed Dec. 27, 1976). *See* App. 512-16.

[36] *United States v. Appawoo*, 553 F.2d 1242 (10th Cir. 1977); *United States v. Fay*, 553 F.2d 1247 (10th Cir. 1977). *See* pp. 30-31 *supra*.

[37] *United States v. McGeehan*, CR-76-87. *See* App. 820-59.

grocery industry in the District of Utah, and, as of the date of its discharge, government attorneys assisting the grand jury had expended approximately 2,000 hours working on the investigation. including the analysis of more than 250,000 subpoenaed documents.[38]

R. Respondent pressures defendants into accepting a jury of fewer than 12 persons.

In *United States v. Jacobsen, supra*, after the jury panel had been exhausted for other trials, respondent "persuaded" the defendant to accept a 10-member jury (App. 257-58):

> THE COURT: All right, do you folks want to agree to get along with a jury of a smaller number than 12? In some places we try cases with a jury of six. We are short of jurors this morning and if you want to take anymore off of this – well, you have already got two off and we have no jurors here. There are two things we can do. One, we can pick up some jurors down in the post office and bring them up which always makes people mad and they don't make very good jurors. I wouldn't want to be picked up myself. The other thing we can do is get along with a jury of less than 12.
>
> MR. WARD: That would be agreeable to the Government, Your Honor.
>
> MR. HANSEN: Your Honor, I have talked with Mr. Jacobsen and he requests the 12 jurors.
>
> THE COURT: All right, I'll tell the jury that Mr. Jacobsen requested 12 and that is why they are being picked up downstairs. All right, it will take us a little while. Go back to the jury room, ladies and gentlemen. I think that that is ridiculous if you want to know my thinking about that.
>
> (The jury left the courtroom)

[38] *See United States v. Ritter*, No. 76-1331 (10th Cir., filed April 20, 1976), and pp. 12-13 *supra*.

MR. HANSEN: Your Honor, Mr. Jacobsen has reconsidered it and he said that he will accept the ten jurors. I have explained to him that it is my advice that he takes the ten.

THE COURT: Well, I'll tell you what happens when we pick them up downstairs. They are just fighting mad when we get them up here. I can order them up, I can order anybody up and pick them up on the street corner out here.

MR. HANSEN: Well, this is a new experience for him and he just thought that 12 is what he is entitled to but I have hurriedly explained it to him and he has accepted it.

S. Respondent pressures defendants to waive their right to grand jury indictment.

Twice during the arraignments held on June 3, 1976, respondent lectured defendants who had been bound over after preliminary hearings and who wished to exercise their right to indictment by grand jury. In each instance he attempted to dissuade the defendant from exercising that right and to persuade him, instead, to "elect" a preliminary hearing.

In both instances respondent had apparently forgotten that the defendants had already been afforded preliminary hearings; he continued to press for waiver of indictment, however, even after he realized his mistake. In one of the cases, *United States v. Smurthwaite*, A76-54M, respondent questioned the judgment of counsel in recommending against waiver. In the other, *United States v. Brown*, A-76-54M, he first forced defense counsel to disclose in the presence of the prosecution his strategy in recommending against waiver of indictment and then threatened to complain to the Bar Association because the lawyer advised his client to take advantage of that constitutional right. Waivers obtained under these circumstances obviously are not valid, and any trial might be futile in light of the defendants' ability to have any conviction set aside.

The following excerpt from the proceedings in *Smurthwaite* on June 3, 1976, also reflects respondent's mistaken impression of the purpose of the preliminary hearing, which is discussed at pp. 12-13 *supra*, (App. 565-67):

THE COURT: Now if you don't waive your grand jury proceeding and you proceed on that route, you have no right to be present and your attorney isn't present and you have no right to demand that evidence that the government has. You don't see it. The next thing that happens to you, you come in here and we take your plea, whether it is guilty or not guilty, to the charge in the indictment. If you plead not guilty, you and your attorney go out and get ready for your trial but you have no opportunity to see the witnesses against you. You have had no opportunity for your attorney to examine those witnesses against you. You have had no opportunity to look at the documents that they are offering in evidence. It gives your attorney no opportunity to see what the evidence is and prepare for trial. Now that is a very valuable right. That is about the most important thing that could happen to you that your attorney and you, right off the bat, at the time of the placing of the charge against you, have an opportunity at a hearing before a judicial officer, the United States Magistrate, to see and confront the witnesses and hear what they have to say. Your attorney can cross examine them and look at the documentary evidence and see all there is.

Now that is what I wanted you to understand. Every defendant ought to understand that. There are two ways by which you may be charged. By one way, your attorney learns nothing, the other way he learns everything and in order that you might make an intelligent decision on this subject, I thought you ought to be told that. All right now, it's up to you. By which route do you want to go? By whom do you want to be charged?

MR. WARD (Asst. U.S. Attorney): Your Honor, I might point out there has been a preliminary hearing in this case before the Magistrate and the Magistrate has bound the defendant over on all 13 counts.

THE COURT: Now at the hearing did the government produce the witnesses?

MR. WARD: That's correct, Your Honor.

THE COURT: And the documentary evidence?

MR. WARD: Yes, Your Honor.

THE COURT: Now why was that preliminary hearing held so early?

MR. WARD: I wasn't aware that it was held anymore expeditiously than other cases, Your Honor.

THE COURT: Well, you ordinarily don't hold the preliminary hearing unless the defendant comes here and asks for it.

MR. WARD: It was a felony complaint, Your Honor, and he was summoned by the Magistrate and a preliminary hearing was held shortly after the complaint was filed.

THE COURT: Well, you have had your preliminary hearing then. All right, what do you want to do?

THE DEFENDANT: I will go on my attorney's advice, Your Honor.

THE COURT: Now what is your advice?

MR. RICHARDSON (Defense counsel): Well, Your Honor, Mr. Hatch represents this gentleman. He's in the hospital but his advice to him was to request a grand jury.

THE COURT: Well, was he in the hospital when he gave that advice?

After making a similar statement to the defendant in *Brown* regarding the grand jury, the following transpired in that case (App. 571-74):

> THE COURT: Now I didn't talk to you the other day. This is the way I talk to every defendant and I thought that just having the attorney come up here and say you didn't want to waive your indictment was not a proper way to handle these cases. So that is why I brought you back. Is he in custody?

MR. BEASLEY (Defense counsel): No, he's not.

. . . .

THE COURT: Well, if you want to hear the government's evidence, you ought to have a preliminary hearing.

MR. WHEELER: (Asst. U.S. Attorney): Your Honor, the defendant has been bound over after a preliminary hearing already in this case after the complaint was filed.

MR. BEASLEY: That's correct, Your Honor, and at the preliminary hearing the United States witnesses were called, they were cross-examined. The documents that the government has were delivered to me and there is an order outstanding by the Magistrate that they are to allow me to examine their files.

THE COURT: Well, then, I wonder why you fellows want to submit these cases to the grand jury.

MR. WHEELER: Your Honor, it is the defendant that made the request. We filed a complaint, held the preliminary hearing and defendant asked for his rights to a grand jury. We had nothing to do with it.

THE COURT: Well, I'd like Mr. Beasley to explain to you what you gain by having this matter go to the grand jury.

MR. BEASLEY: Your Honor, first of all there is one possible defensive procedure that we could gain by going through the grand jury.

THE COURT: Like what?

MR. BEASLEY: Well, I would rather not disclose it at this time. It might be detrimental to Mr. Brown's case. With the U.S. Attorney being present, I would just as soon that they not know what that procedure is. The second reason is that it's entirely possible –

THE COURT: Well, by what possible route can you find a defensive procedure that would be helped by you having a grand jury indict this man?

MR. BEASLEY: Mr. Brown is charged with four counts. It is entirely possible that the grand jury, in reviewing the government's evidence, which at least on two of the counts in my opinion is extremely weak. They might well decline to hand down an indictment

on some or even all of the counts and for that reason I have explained to Mr. Brown that there is that possibility.

THE COURT: The grand jury might not indict him after the government goes in without you there, without the defendant there and presents all the evidence they have against him and the government attorneys handling the case? Do you think you have a better chance of getting a withdrawal of charges than take it up with the district attorney himself?

MR. BEASLEY: It was my belief in that respect, Your Honor, that if the United States Attorney were compelled to review his evidence and discuss it with his witnesses again in order to present it to the grand jury, he might possibly find the holes in his case and at that point he might want to withdraw those charges.

THE COURT: Well, I am going to ask the man what do you want to do about it?

THE DEFENDANT: Well, I don't know too much about the law but I'll take my attorney's advice.

THE COURT: All right, you take your attorney's advice. It's something I will take up with the bar association.

Another example of respondent making it difficult for a defendant who had already had a preliminary hearing to proceed with his request for a grand jury is *United States v. Crews*, CR-74-135. In the process of castigating the government for performing its function of assisting the grand jury, the following occurred at the time for arraignment in that case on July 11, 1975 (App. 576-78):

MR. WHEELER (Asst. U.S. Attorney): The defendant in this case was also bound over after a preliminary hearing. There has been no waiver of grand jury indictment.

MS. COLLARD (Defense counsel): Yes, your Honor, we would like a grand jury.

THE COURT: Well, you "ain't" going to get one. We have just about run out of grand juries.

. . . .

THE COURT: What do you want a grand jury for?

MS. COLLARD: To protect the defendant.

THE COURT: Pardon?

MS. COLLARD: To protect the defendant, I believe, to see that the charges are well founded.

THE COURT: Do you know how the grand jury operates?

MS. COLLARD: I have an idea.

THE COURT: The defendant isn't admitted into the room. The defendant's attorney isn't admitted into the room. The only people who get into the room are the Government agents and their witnesses. And they go on in there and present the matter, and guess what you get: You get a charge against him every time. That is the way the grand jury operates. For the life of me I don't know why anybody would want to have a grand jury.

. . . .

Now, this is just a delay. If you want to stand on your Constitutional right, you can do it. Before I discharge the grand jury I will have him charged. You heard what I said: I will have him charged. That is what it boils down to. The Government will present the evidence they have against this fellow, and the grand jury will indict him as sure as fire.

I give that little lesson this afternoon.

Step aside. Hold him for the grand jury and present it to them before the end of the month.

MR. WHEELER: Yes, your Honor.

THE COURT: Because I am going to get rid of the grand jury.

MS. COLLARD: Thank you, your Honor.

THE COURT: You are welcome.

T. Respondent sentences defendants and sets bail in front of the jury.

In *United States v. Speir, et al.*, CR-75-34, appeal pending, Nos. 75-1807 and 75-1808, respondent sentenced the defendants to the maximum term in front of the jury (App. 581-90):

> THE COURT: Thank you very much, ladies and gentlemen of the jury. Of course, you reached the right verdict . . . Just another indication that I have found for 27 years here where I have had the honor to represent the people of the United States that our jurors can't be bamboozled.
>
> You folks followed the evidence. You reached the right result. I didn't like some of the tactics of counsel in this case trying to pull red herrings around the courtroom, trying to fool the jury.
>
> The defendants will come forward for sentencing.
>
> . . . .
>
> THE COURT: Now, the worst culprit of the lot is Black. He is the biggest enterpriser down there. Runs the biggest Christmas tree business in that area, the evidence was.
>
> MR. MILLER: Might I speak to that subject?
>
> THE COURT: No, you may not. I heard the evidence. My judgment on that evidence is that Black is the worst culprit of the bunch.
>
> You are sentenced to ten years, Black, in the federal penitentiary. And your fine is $10,000. That ought to have happened to you a long time ago.
>
> . . . .
>
> I don't like these fellows that come in here and commit perjury. Perjury is a felony. So that is charged as a felony.
>
> . . . .
>
> Have we any indication about whether he can pay a fine? I would like to take the profit out of that business.
>
> . . . .
>
> THE COURT: I am going to sentence him [Speir] today.
>
> I am going to fine you $10,000 in addition to the 10 years in the pen.

> Now, what I will do about that fine is that if my probation officers find out anything they want to bring to my attention that would indicate – I will lower the fine and take that into consideration later. But he is fined now. If I let this go over to another time, I can't legally sentence him. So I'm going to sentence him right away.
>
> . . . .
>
> I will give you 10 years, Puffer, and fine you $10,000.

As a further example of sentencing in the presence of the jury, see the excerpt from the trial transcript in *United States v. Latimer*, 548 F.2d 311 (10th Cir. 1977) (App. 592-99).

In *United States v. Bray*, No. 75-1932 (10th Cir., September 24, 1976), respondent set bail in the jury's presence after the first day of trial. Although the defendant was charged with a misdemeanor tax offense, bail was set at $50,000 and the marshal was admonished to "lock him up" if bail was not met. The defendant was convicted, and this Court reversed (App. 602-03):

> THE COURT: Is this fellow, Bray, in custody?
>
> MR. BARBER (Defense counsel): He is not, your Honor.
>
> THE COURT: Why isn't he?
>
> MR. BARBER: At this time he is at liberty on his own recognizance on this charge, your Honor.
>
> MR. WHEELER (Asst. U.S. Attorney): He was brought in pursuant to a summons, your Honor. Bail was never set at that time.
>
> THE COURT: Well, bail is set now. $50,000 bail. If you can put up 10 percent of that with the clerk, you can be released. Otherwise, lock him up.
>
> I will see you at ten o'clock in the morning, ladies and gentlemen.

As this Court observed, setting bail or sentencing defendants in front of the jury not only harms the defendants but also makes it difficult or impossible to use the same jurors in future cases.

II

RESPONDENT NEGLECTS GOVERNING CASES IN THE TENTH CIRCUIT, HAS CONTEMPT FOR THE JUDGES OF THAT COURT, AND CONDUCTS HIS BUSINESS IN ORDER TO AVOID APPELLATE REVIEW OF HIS DECISIONS.

A. Respondent persists in erroneous conduct after reversal by the Court of Appeals.

Judge Ritter persists in conduct that he knows to be erroneous. We have collected a few of many examples.

1. In *United States v. Smith*, 495 F.2d 668 (10th Cir. 1974), this Court reversed a conviction before respondent because he failed to conduct any evidentiary hearing on a motion to suppress filed prior to trial. During the trial the evidence in question was admitted over objection. This Court instructed respondent to hold evidentiary hearings on suppression motions prior to trial of the case.

In the subsequent case, *United States v. Kay*, No. 76-1299 (10th Cir., June 23, 1976), respondent suppressed critical government evidence and dismissed the case after a "hearing" at which no witnesses were sworn and no evidence was received. On appeal, this Court cited *Smith* and stated as follows in its unpublished opinion:

> Disputes such as this are resolved by the taking and consideration of evidence. The statements and arguments of counsel are not a substitute for a proper evidentiary hearing. *United States v. Smith*, 495 F.2d 668 (10th Cir., 1974). In view of the nearly complete absence of factual development in this case, we can only conclude that the district court's order suppressing evidence and dismissing the action was premature. Accordingly, the order appealed from is vacated and the matter remanded to the district court for an evidentiary hearing.

Despite such holdings, respondent continues to pass on such motions without hearing evidence.[39]

2. In *United States v. Kysar, supra,* this Court held that respondent erred when he ruled that dismissal of the complaint by the magistrate precluded subsequent prosecution by indictment. Respondent repeated his *Kysar* ruling in *United States v. Beers, supra,*[40] and has now been reversed by this Court a second time on the same issue.

3. In *United States v. Cartwright*, No. 76-1017 (10th Cir., Mar. 9, 1977), this Court held it was obvious that respondent "made no real attempt to satisfy the requirements of Rule 11 before accepting the plea of guilty." Yet on a single day less than three months later respondent accepted guilty pleas in at least three cases without the least attempt to advise the defendants, as required by Rule 11(c), or inquire as to the voluntariness of the pleas, as required by Rule 11(d).[41] This conforms with respondent's stated intention to disregard these requirements.[42]

4. Despite this Court's condemnation in *United States v. Appawoo, supra,* and in the writ of mandamus granted in *United States v. Ritter*, No. 76-1011 (10th Cir., mandamus issued May 20, 1976), of respondent's practice of deferring a decision of pretrial motions until trial, respondent persists in that practice.[43]

5. In *United States v. Gardner*, 480 F.2d 929 (10th Cir.), *cert. denied*, 414 U.S. 977 (1973), this Court held that during sentencing on July 12, 1972, respondent erred in failing to follow Fed. R. Crim. P. 32(a)(1), which requires the trial

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[39] *United States v. Radmall*, CR-76-118, (App. 209-10).

[40] This case is discussed at pp. 16, 22, *supra.*

[41] *United States v. Martinez*, CR-77-00045; *United States v. Chidester*, CR-77-00044; *United States v. Lloyd*, CR-77-00049. *See* pp. 27-28 *supra.*

[42] *United States v. Bradshaw*, CR-75-8, (App. 162).

[43] *United States v. Radmall*, CR-76-118; *United States v. Wagstaff*, CR-76-120. *See* pp. 32-33 *supra.*

court to "address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment." The Court remanded the case for resentencing. Respondent continues to commit the same error. *United States v. Latimer,* 548 F.2d 311 (10th Cir. 1977), is a recent example. Citing *Gardner,* this Court held in *Latimer* that Rule 32(a) had not been complied with and again remanded the case for resentencing.

6. Notwithstanding this Court's writ of mandamus in *United States v. Ritter,* No. 76-1919 (10th Cir., mandamus issued Nov. 6, 1976), directing respondent to set each case on the then-pending trial calendar for trial on a date certain with a minimum of 15 working days' notice, respondent set the next group of cases on weekly calendars (with no date certain for trial) and later converted the weekly calendars into a single trailing calendar.[44]

7. Respondent refuses to follow rules of evidence that are the law of this Circuit. He bars the government's representatives from the courtroom if there is a likelihood he will be called on to testify, contrary to Fed. R. Evid. 615.[45] He refuses to allow the prosecutor to impeach his own witness, contrary to Rule 607 of the Federal Rules of Evidence.[46] He refuses to admit evidence of prior, similar transactions to show knowledge and intent, stating that he didn't "care what any of the circuits had held. . . . [I]t [has] been the rule in [this] court for 27 years that such evidence [is] not admissible and [won't be permitted].[47]

B. Respondent shows contempt for the judicial process.

Speaking to the jury that convicted the defendant a second time in *United States v. Latimer,* 548 F.2d 311 (10th Cir. 1977) (remanded a second time for resentencing), Judge Ritter said (App. 593):

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[44]*See* pp. 36-38, *supra.*
[45]*See* pp. 45-47, *supra.*
[46]*See* pp. 54-55, *supra*
[47]*See* pp. 57-58, *supra.*

THE COURT: Very well, ladies and gentlemen, thank you very much. Of course, you have reached the right result in this case.

For your information, two juries have reached this result. I have tried this case before. On some technicality, I have not even read the opinion on it, I don't know what it was, the Court of Appeals reversed me on this count.

So after two juries reached this result, maybe those fellows up there that sit around and chew their fingernails and fiddle around about some damn thing – You know what an appellate court ought to do, they ought to come down on a trial bench and try some cases. I am going to document it with the God Damn fool decisions handed down.

If somebody here doesn't report that to them, I will write them and tell them.

This case ought never to have been tried again. This fellow ought to be serving time.

During the second sentencing of Latimer, which was conducted in the presence of the jury (see page 74, *supra*), Judge Ritter attempted to punish the defendant for appealing by increasing the sentence; he was critical of higher courts whose rulings restrained him from doing so (App. 596-97):

> THE COURT: 20 years is all I can give him?
>
> MR. SNOW: There is some question on that in view of the previous ten year sentence. The appeal courts have hold [sic] that without specific reasons –
>
> THE COURT: How many the hell specific reasons do you need beyond what we have here?
>
> MR. SNOW: I agree with the Court, but the appelates [sic] held that the imposition of the first sentence for the same crime can't be increased. It constitutes violation of double jeopardy. That is my understanding of the law.
>
> THE COURT: Well, that is just too damn bad. They are too lenient with these fellows.

During the same proceeding respondent also criticized the defendant for having the "affrontery" to exercise his right to trial by jury, criticized the defense attorney for assisting

the defendant in exercising that right, termed "ridiculous" the rule requiring that the defendant be advised of his right of appeal, and expressed a desire to sentence the defendant to 100 years' imprisonment (App. 592-99).

In a similar display of pique, on May 18, 1977, respondent interrupted argument on a motion in a civil case not involving the United States to express his displeasure with (and threaten to sue) a group of public officials, including the Chief Judge of this Court.[48]

C. Respondent conducts his business in order to avoid appellate review of his decisions.

Respondent's attempts to avoid appellate review of decisions that he knows are erroneous are illuminated by *United States v. Appawoo, supra,* and other similar cases. Respondent purposely postpones rulings on pretrial motions until after jeopardy has attached in order to use the Double Jeopardy Clause as a shield against appellate review.[49]

Respondent's behavior with regard to the enforcement of Internal Revenue Service summonses provides another example. Until the government appealed the court's ruling in *United States v. Nichols,* No. 76-1705 (10th Cir., decided Feb. 11, 1977), respondent routinely dismissed, *sua sponte,* cases in which the government petitioned for an order to show cause why a taxpayer should not be compelled to respond to an IRS summons that he has refused to obey.[50] Respondent dismissed the *Nichols* case on June 2, 1976, and the government's notice of appeal was filed on June 28, 1976.[51]

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[48] *In the Matter of Transcripts Withheld from the United States by the Honorable Willis W. Ritter,* No. 77-1941 (10th Cir. Judicial Council, filed July 5, 1977). *See* pp. 60-61, *supra.*

[49] *See* pp. 30-34, *supra.*

[50] *See* pp. 110-112, *infra.*

[51] On February 11, 1977, this Court reversed and remanded the case for a disposition of the government's petition on the merits. In its per curiam order this Court held that respondent's dismissal was premature and without any support in the record.

After *Nichols* was appealed, respondent began taking a different approach. He now states that he will consider the government's petitions for orders to show cause, but only if the summoned taxpayer appears in court at a hearing on the petition. However, since a judicial order to show cause is the only means of securing the presence of the taxpayer in court, the United States cannot comply with respondent's condition precedent to consideration of its request, and at the same time respondent enters no appealable order of dismissal.[51] The United States is effectively denied a forum in which to enforce IRS summonses.

The transcript of proceedings conducted in enforcement cases on August 17, 1976, demonstrates respondent's change in approach. Five enforcement cases were set for hearing on that date on the government's petitions for orders to show cause.[52] In the first case the taxpayer was not present and respondent denied the petition. The remaining four cases were considered together, and respondent made the following ruling (App. 608-09):

> THE COURT: All right. You are not going to get a ruling out of me until I have the people on the other side present who can assist in presenting to me what is in fact involved. This is as blind as that wall over there. I don't know a thing about any one of these. Now the first one, I said that was denied. Where is that, is that number 24?
>
> MR. WHEELER: We agree, Your Honor. The problem is we have not been able to secure the presence of the taxpayers. I don't know how to remedy that prob-

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[51] The United States could obtain a decision only if the taxpayer voluntarily appeared. But since summonses are necessary only in the absence of voluntary cooperation, it is quite unreasonable to suppose that taxpayers will voluntarily cooperate in obtaining their issuance.

[52] *United States v. Yeck,* C-76-184; *United States v. Bachman,* C-76-206; *United States v. Reid,* C-76-231; *United States v. Dudley,* C-76-242; and *United States v. Dudley,* C-76-243.

lem. The notices went out. Possibly in some of these other cases the taxpayers are here. I don't know them by sight so I don't know.

THE COURT: Well, we can soon find out about that. The first one is 26 on the calendar, Elwood V. Bachman. Is he present? John Reid, is he present? Jennie Dudley, is she present? I guess that's a woman. Harold Dudley, is he present? Are there any others?

MR. WHEELER: No, Your Honor, that is all. Apparently none of the taxpayers have responded.

THE COURT: All right, that will be all today.

III

RESPONDENT SITS ONLY INFREQUENTLY IN CRIMINAL CASES, THUS JEOPARDIZING DEFENDANTS' RIGHTS TO A SPEEDY TRIAL

Criminal trials have been infrequent in respondent's court during 1976 and 1977. One case was tried in March 1976 and one case in April 1976. Once this Court's writ of mandamus issued directing respondent to set specific trial dates in 50 cases that had been set for trial on October 12, 1976, respondent set nine cases for November 1976, ten cases for December 1976, and five cases for January 1977. The only cases set for trial since then were 22 cases set for trial in July 1977 and the two cases set for trial in August 1977.[53]

As a result, respondent usually reaches cases for trial only once they have become very old. At any given time many cases have been awaiting trial longer than the 180 days permitted by the Speedy Trial Act. See 18 U.S.C. §3161.[54] Likewise, at any given time many defendants have not been arraigned within ten days of the filing of the indictment or information, as required by the Act.

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[53] These figures are for cases calendared for trial. Fewer cases were actually tried.

[54] The time now has been reduced to 120 days. 18 U.S.C. §3161(g).

For example, on April 1, 1977, out of 49 defendants awaiting trial, 17 had been waiting more than 180 days. On the same date all 34 defendants awaiting arraignment had been waiting more than 21 days; some had been waiting as long as 114 days.[55] On June 1, 1977, 58 defendants were awaiting trial. Twenty-four of these had been waiting more than 180 days. Sixty-four defendants were awaiting arraignment on that date, all but three of whom had been waiting more than ten days. Some had been waiting as long as 321 days.[56]

On July 27, 1977, 13 of the 56 defendants awaiting trial had been waiting more than 180 days, two as long as 345 days. Twenty-two defendants were awaiting arraignment on that date, all for more than 10 days. Several defendants had been awaiting arraignment for 169 days.[57]

On September 26, 1977, out of 82 defendants awaiting trial, 13 had been waiting more than 180 days. One had been waiting 301 days and several 283 days. Seven of the defendants awaiting trial had been in custody in excess of 90 days as of September 26, 1977. None of the persons awaiting trial on that date has yet been tried. On the same date 19 defendants were awaiting arraignment. Seventeen had been waiting longer than ten days. One had been waiting 171 days; one had been waiting 139 days; 13 others had been waiting more than 80 days for their arraignments. None of these persons has yet been arraigned.[58]

Following passage of the Speedy Trial Act, 18 U.S.C. §3161 *et seq.*, the United States Attorney initiated a practice of informing respondent by memorandum on at least a monthly basis concerning the speedy trial status of the criminal cases pending action in respondent's court. The United States Attorney continued to inform the court in this manner

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[55] App. 611-17.

[56] App. 618-25.

[57] App. 626-31. The latter defendants were arraigned July 28, 1977.

[58] App. 632-37.

until respondent expressed his displeasure at the practice,[59] after which it was discontinued. Government prosecutors nevertheless continue to advise respondent of speedy trial problems from time to time. For example, in November 1976, respondent was reminded in general of these problems and asked to arrange for a visiting judge to assist in reducing the backlog cases, but no action has been taken.[60]

Furthermore, in every criminal case the Department of Justice files a form (AO-257) with the court containing all data necessary to monitor the speedy trial status of the defendant.[61]

IV

RESPONDENT IS BIASED AGAINST THE UNITED STATES AND ITS REPRESENTATIVES

Respondent regularly demonstrates a personal bias against the United States and its attorneys and agents engaged in the discharge of their official duties. His bias appears most prominently simply from his rulings, coupled with the fact (which has been illustrated above) that he often refuses even to allow the prosecutor to speak concerning arguments and objections raised by defense counsel or by the court personally. But respondent also has demonstrated personal bias, and we set out several instances of that sort below.

A. In *United States v. Lennox*, CR-74-19, defense counsel, apparently with the prior approval of the defendant, unilaterally initiated a change of plea from not guilty to guilty, without any concession whatsoever from the govern-

[59] These memoranda and an affidavit describing respondent's expression of displeasure are collected at App. 638-58; 664-65.

[60] This communication to respondent, along with examples of other unsuccessful attempts to advise respondent of growing speedy trial problems in particular cases are reproduced at App. 659-63; 666-68.

[61] App. 669.

ment. When questioned about his motive for changing his plea the defendant then stated on the record that he had "a deal." The defendant did not say what he meant, except to complain that he felt he needed better counsel. When government counsel attempted to explain that the government had not even discussed a plea bargain or "deal" with the defendant or his counsel, respondent immediately became very abusive (App. 177-78):

> MR. SNOW: I would like to make a statement if I may, Your Honor.
>
> THE COURT: I don't want to hear one word out of you, Snow, not one word, now or hereafter.
>
> MR. SNOW: I haven't had any discussion –
>
> THE COURT: Just shut up. I told you I didn't want to hear anything.
>
> MR. SNOW: O.K.
>
> THE COURT: Out of you. I have had a stomach full of you.

Although no jury had been sworn and the matter was before him for a change of plea only, respondent declared a "mistrial" and blamed counsel (App. 182-83):

> THE DEFENDANT: I am going to hire me another attorney.
>
> THE COURT: All right. You don't owe him any more money, that is for damn sure, not after getting you into this one. And, of course, it is necessary to declare a mistrial in this case as a result of this very brilliant activity on the part of the deputy United States attorney and defense counsel, and the court does so. A mistrial is declared and a new trial ordered. We will set this down for trial Monday morning if your counsel can get ready.

B. In *United States v. Smith and Orlob*, CR-75-14, respondent blamed the government for the fact that defendant Smith had been awaiting sentencing in a county jail for eleven months, although during that time Smith was serving time on a state sentence. Respondent also blamed the

government for a similar delay in the sentencing of defendant Orlob. Since both Smith and Orlob were also charged in further indictments then awaiting trial, respondent also took occasion to criticize the government's handling of the grand jury (App. 680):

> THE COURT: And we have a grand jury around here. You are dragging your feet with this, too, hanging onto a grand jury in order to – in order really to work up your case. It ought to have been worked up before it was brought before a grand jury.
>
> I am looking into that. I think I am going to discharge the grand jury. That is my thinking this morning. And that is based on a memorandum I was handed yesterday. I think I am going to wind this up.

When the government attempted to respond to the court's criticism, counsel was threatened with contempt (App. 684):

> MR. SNOW: On the grand jury may the Government respond, Your Honor.
>
> THE COURT: Another thing. You had better keep your mouth shut or you will be over there in the county jail where you can try some of those fifteen-cent meals. I don't want anything from you at all.

C. In *United States v. Hochmiller*, CR-75-32, after the defendant had been convicted the court inquired whether the government had anything to say about the defendant's bond. The government's response caused respondent to harshly criticize the prosecutor (App. 687):

> THE COURT: Do you have anything to say about the bond?
>
> MR. SNARR (Asst. U.S. Attorney): I believe the presumption after a man has been found guilty is much different than otherwise. He should be taken into custody and/or bond.
>
> THE COURT: You are a very great help. You ought to be fired as a prosecutor. If I had anything to do with it, you would be fired.

> There is a hell of a difference between a man who is charged and a man who is guilty. There is a hell of a difference.
>
> The bond is fixed at $10,000, and he can put up ten per cent of that.

D. From the beginning of the trial of *United States v. Ruesch*, CR-75-80, respondent displayed contempt for the government for filing the case. He stated he didn't "expect to spend more than 15 minutes on [the case]," called it ". . . one of those big deals that the District Attorney's office is always bringing in here, a two-bit case," and termed the filing of such cases ". . . a very bad attitude for prosecutors to have" (App. 692, 707).

E. As the following passages show, during the non-jury trial in *United States v. Porter* (uttering counterfeit obligations), CR-75-118, respondent was sarcastic and abused government counsel and witnesses (App. 712):

> MR. SNOW (Asst. U.S. Attorney): Would you state and spell your name for the record, please.
>
> THE WITNESS: RaDene Withers, R-a-D-e-n-e –
>
> THE COURT: Open your mouth and speak out loud. Don't talk like Barbara Walters does on that Today show. She never opens her damn mouth. Talks too fast. Never says anything. I want to hear you.

Later, after the defendant objected to eyewitness identification testimony, the following occurred (App. 713):

> MR. SNOW (Asst. U.S. Attorney): Your Honor, the clerk has already testified and identified the defendant Porter, and this was shortly after, within an hour or two of when the notes were passed. Under Kirby vs. Illinois that identification was permissible within close proximity to the act of the crime.
>
> THE COURT: Well, I am not so damn sure about that. You are pretty glib. Why don't you give me a case? You haven't got a book before you, not one.
>
> MR. SNOW: No, sir. This is the first time counsel has ever complained about the identification.

When offering in evidence the items purchased with one of the counterfeit notes, government counsel noted that in lieu of a bottle of liquor he was offering a sales slip only (App. 714):

> MR. SNOW: I have a bottle of Seagrams, your Honor, but I won't offer that.
>
> THE COURT: Well, I don't want any of your grotesque, unseemly attempts at humor. This is a court of law.
>
> MR. SNOW: Certainly and I apologize.
>
> THE COURT: You are just too funny for words.

The following exchanges occurred as the trial neared conclusion (App. 715):

> THE COURT: Mr. Snow?
>
> MR. SNOW: Your Honor, I think there is ample evidence of his –
>
> THE COURT: It doesn't make a bit of difference what you think Now the thing for you to do is tell me what it is.
>
> . . . .
>
> THE COURT: And secondly, where do you show any intent to defraud the United States?
>
> MR. SNOW: Well, those two are linked very closely together, your Honor. It is –
>
> THE COURT: Thank you very much for that information. That helps me a great deal. Now, let's hear your case.

F. In *United States v. Countryside Farms,* CR-75-76, in which this Court recently issued an order directing that the case be tried by another judge, respondent responded as follows to the government's argument that furnishing certain matter to the defendants in response to a bill of particulars might curtail the vigorous enforcement of the antitrust laws (App. 731):

> THE COURT: Well, isn't that too damn bad. . . .

Based upon this and other factors this Court ruled in *United States v. Ritter,* 540 F.2d 459, 464 (10th Cir.), *cert.*

denied sub nom. Olson Farms, Inc. v. United States, 429 U.S. 951 (1976), that it could not predict that

> . . . in light of the total facts and viewing the future of this case in the light of [28 U.S.C.] section 455(a), there exists reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States district court.

G. The arraignments in *United States v. Larsen,* CR-75-187, and *United States v. McIntosh,* CR-75-184, transcribed in the Appendix, are two among many examples of routine intemperance exhibited by respondent toward government attorneys (App. 746-51).

H. In the course of holding that an indictment provided no indication whether there was probable cause to return it, respondent recently insinuated in *United States v. Foster, supra,* that the grand jury was being browbeaten by "Department of Justice invaders" sent from Washington for that purpose (App. 514-15):

> MR. WARD: As to the motion to dismiss, Your Honor, we would just respond that the Indictment itself is of course evidence of a finding of probable cause. The transcript was not prepared –
>
> THE COURT: No, it isn't anything of the kind, an Indictment isn't evidence of anything. The Indictment is not evidence. The Indictment is under attack on the ground that you didn't have probable cause to return it. The Indictment doesn't say anything about that.
>
> MR. WARD: What I meant was that at least 12 jurors voted that there was probable cause to believe that a crime had been committed and that the defendant committed the crime.
>
> THE COURT: Those people that voted were arraigned by you fellows. Who was it that had that Grand Jury?
>
> MR. WARD: That was Michael Hunter, former assistant in the office.
>
> THE COURT: Yes, and who were the Department of Justice invaders who were here on that occasion –

MR. WARD: There were none, Your Honor.
THE COURT: – to persuade the Grand Jury?

I. On May 25, 1976, respondent began referring to the government and its attorneys as "lame ducks." The initial reference was made during a hearing in *Julander v. Ford Motor Co.*, C-274-70, a civil case in which the United States was not a party. When counsel asked for a postponement of trial, respondent replied (App. 754):

> THE COURT: Well, that will be October then because I am not going to work this summer. I am going to enjoy my security. The committee has thrown out that silly attempt that was made and anybody that wants to try to impeach me, go ahead. So I am going to have a little vacation this summer.
>
> MR. SAVAGE: Well deserved. We have an order prepared today –
>
> THE COURT: Well, don't butter me up at all. Anybody that talks nice to me, they get an affidavit of prejudice out, especially from the Department of Justice.
>
> MR. SAVAGE: We have an order –
>
> THE COURT: Lame ducks, they don't know it but they're lame ducks. All right, when do you want to try it?

J. Since the issuance by this Court of a writ of mandamus in *United States v. Ritter*, No. 76-1917 (10th Cir., mandamus issued Nov. 6, 1976) (trailing calendar), respondent has continuously maligned government attorneys and this Court.

At a call of the calendar on November 8, 1976, two days after issuance of the writ, pressure by respondent to proceed to immediate trial forced a government attorney to rely on the writ of mandamus. *United States v. Shields, supra*, (App. 83-84):

> THE COURT: When did I issue this call of the calendar, Miss Clerk?
>
> THE CLERK: October the 15th.

> THE COURT: October the 15th and here it is November and here it is the 8th of November. Now you folks understood, didn't you, that on a call of the calendar in this Court, when we get through calling the calendar, we begin trying the cases.
>
> MR. SNARR (Asst. U.S. Attorney): We did not understand that to be the case and believe that the Circuit Court of Appeals did not understand it either, Your Honor.
>
> THE COURT: Well, the Circuit Court of Appeals doesn't know anything about it. They don't practice down here. You mean to stand there and tell me that you haven't observed that in this Court?
>
> MR. SNARR: Your Honor, the practice has been observed, yes.
>
> THE COURT: In other words, you know that that's the practice I have followed.
>
> MR. SNARR: Yes, Your Honor.
>
> THE COURT: That at the conclusion of the call of the calendar we start trying the cases.
>
> MR. SNARR: Your Honor, the practice has been observed. It's a practice which has been the subject of litigation which we disagree with in light of the Speedy Trial Provisions.
>
> THE COURT: Well, you have got something going on now. Methinks there is a viper in it and I am proceeding to deal with it. What is the earliest date you can get them here?

Similarly, on November 15, 1976, Assistant United States Attorney Brent Ward accompanied defense counsel in *United States v. Huntsman*, CR-76-41, to respondent's chambers, where defense counsel asked respondent for a continuance of the trial in that case. Mr. Ward suggested two dates that remained open following the settings made during the call of the calendar on November 8, 1976. Mr. Ward's affidavit recounts that respondent then "made reference to the efforts of the Court of Appeals and the United States Attorney's office to force him to set certain dates for criminal trials on his calendar" and asked Mr. Ward "What in the hell are you bastards doing down there anyway?" (App. 758).

K. On November 17, 1976, the government was forced to move to dismiss the day before trial in *United States v. Huntsman, supra,* because of the death of the government's principal witness. Respondent criticized the government in the presence of the entire jury panel and refused to permit the prosecutor to make any explanation (App. 760-61):

> THE COURT: Well, is the next case ready?
>
> MR. WARD: The next case I don't believe is set for today, Your Honor, I believe it is set for tomorrow.
>
> THE COURT: Well, this shows very clearly what is wrong with setting calendars the way the United States Attorney has demanded that they be set. Here we have a jury panel, citizens called in from their various walks of life, their businesses and their activities, to try a lawsuit and the United States Attorney dismisses it so there is no case to try and instead of another case available so that we can go ahead and utilize the jury and save the taxpayers the money, we have a waste, a very wasteful situation. All these jurors waiting here to do their duty and the United States Attorney is sitting on his hands.
>
> Sure there will be a case tomorrow but this is what the jury was called in here to try, the case today. Now if you are going to dismiss a case, you ought to dismiss the case before the eleventh hour and fifty-ninth minute and give us an opportunity to call these people and excuse them so they don't have to come up here and waste their time when they have their own labors, their employment and their activities.
>
> So this is a splendid example really – this is the wrong word – it's a deplorable example of what happens when you give a specific date to a specific case and you don't have another case ready to follow on.
>
> Now the United States Attorney is responsible for this and the Department of Justice ought to pay the bill. The Court should not be charged with the expense of this jury here today and I'm going to write

> to the Attorney General of the United States and tell him so.
>
> Sorry, ladies and gentlemen of the jury, it is no fault of mine, it is no fault of yours, it is entirely the fault of the United States Attorney.
>
> MR. WARD: May I make a statement, Your Honor?
>
> THE COURT: No, you may not. You have done enough damage here. . . .
>
> All right, ladies and gentlemen, sorry, I hate to do this to you. If I had known anything about it, I would have had you called so you needn't have had to come in here.
>
> MR. WARD: Your Honor, I do believe there is a satisfactory explanation.
>
> THE COURT: Well, you desist from making any statements, it is wholly immaterial. If you want to make any statements, write it to me, write it to the Attorney General because I think you are going to be called on the carpet for this.

Counsel set forth the explanation in a letter to the court.

Respondent has blamed the United States Attorney's office for the inconvenience caused by the defendant's failure to appear for trial in *United States v. Shields, supra,* and repeatedly and openly called for dismissal of the United States Attorney and his staff. The following statement was made in the presence of the entire jury panel (App. 91-93):

> THE COURT: Well, what we have here, ladies and gentlemen, is the defendant is not here and we can't try a lawsuit without the defendant . . . [I]t's a great burden and an unnecessary burden on the taxpayers to have these cases set down one case a day such as today; one case on Monday, the first day of the week, and that's been imposed upon me. That isn't the way I run my Court around here. That's how the United States District Attorney insisted upon it being done.
>
> Now what ought to happen to him is that he ought to be removed from office and at once, along

with his deputies. Here we are, you folks sitting around, you have made great sacrifices, laid aside your personal matters, you have laid aside your business matters; many of you have had to give up your compensation where you are working and you're here at great personal sacrifice to you all, and the United States Attorney will not bring another case in here so that we can conserve your efforts, put them to good use and recoup something from the moneys the taxpayers are laying out for the juries.

Well, I am not going to burden you further. You are excused, ladies and gentlemen of the jury, for the balance of the day .... That is the way the United States Attorneys run their business, but it's never going to happen in this Court again, I'll tell you that. The ones that are out there are going to be removed from office and we'll have men who will have some sense about these things, some concern for the Government from which they draw their pay and some responsibility to the people who pay their wages, the taxpayers.

All right, I'll see you in the morning and I regret very much to have brought you down here this morning. So do come back in the morning at 10:00 o'clock and I can promise you nothing but you will get paid for these days that you are here. All right.

On November 24, 1976, respondent used a change of plea in *United States v. Doiron*, CR-76-31, as a further occasion for an attack on the United States Attorney's office (App. 768-70):

> THE COURT: Well, ladies and gentlemen of the jury, the United States Attorney, Mr. Ramon Child, didn't like the way I was running this Court so he got the Circuit Court to impose this calendar on me, one case a day.
>
> Now my system has always been to have a case standing by so that when we bring you in, fifty or sixty jurors, we have something for them to do when the cases go off. Now these criminals change their minds about their not guilty pleas as you heard this

> morning and as you heard three or four other cases the past couple of weeks and when that happens we waste the time of the jurors cause the United States Attorney hasn't anything for you to do.
>
> Now I think this is a deplorable situation. It's wrong and it's going to be remedied in the very near future. . . .
>
> Now when you get here, we haven't anything for you to do. Now I'd say that is a deplorable situation. I'll take no responsibility for that at all. The responsibility lies with the United States District Attorney. I don't remember that he ever came into this courtroom in the twenty-seven years – it's twenty-eight now that I have been here, never saw him, didn't know who he was. He's been here about six months. The former District Attorney got killed. This fellow is here, never been in my courtroom, never practiced in this federal court.
>
> Now he's busying himself with embarrassing me, embarrassing the Court, imposing upon the time of the jurors by this sort of business. And the Deseret newsboy over there taking all this down so they can put it in the newspaper. The Deseret News has been supporting him in this. . . .
>
> So the next case begins on Monday; Monday, November 29th, at which time will you kindly come back here. I have no assurance that we'll have anything for you to do. These attorneys sit on their hands too you know in the meantime. I don't mean the defendants' attorneys, I mean these fellows that are working for the United States Attorney. They sit on their hands.
>
> This is a strange way to run a railroad or a Court or anything else. When we get through we'll summarize this whole thing and I'll have something very strong to say about it.

L. *United States v. Mitchell*, CR-76-45, was a loan fraud case. When respondent felt government counsel was not adequately prepared for a motion made by defense counsel on the morning of the trial, he responded (App. 722):

THE COURT: Well, that's a great day when the United States Attorney's office prepares its case. That is going to take place very soon. You fellows are lame ducks now. Every damn one of you is going to go out over there and maybe we'll get some help. I'll reserve a ruling on this. Call the jury in.

Respondent also took occasion to criticize the complaining government agency (App. 774):

Now there is a banker down there who did but he insisted on a guarantee from the Small Business Loan outfit, the federal government. Now here it is, that banker is made whole and the people who are out are the taxpayers. The people who ought to be out and maybe they will be in the transition that is now taking place, as soon as we get another administration back there in Washington and kick some of the crooks out of the office back there, whoever in the Small Business Agency – what is it called?

MR. BOYACK: Small Business Administration, Your Honor.

M. In *United States v. Nakai,* CR-76-54, respondent threatened the prosecutor with a contempt citation for invoking the government's right to a jury trial under Fed. R. Crim. P. 23(a). Respondent ordered the government to proceed without a jury and made the following statement (App. 306):

THE COURT: Very soon we are going to have a different United States District Attorney and a different deputy attorney and we are going to have a change in that office. These fellows, everyone of them, is going out of office and one reason that everyone of them is going out of office is this sort of thing. No attempt to cooperate with the Court at all or with other counsel; stubborn, unreasoning. That is going to happen very quickly. Now proceed with the trial.

When government counsel then expressed concern that the strength of the court's feelings might affect the detachment

required for a fair trial, respondent threatened him with contempt (*ibid.*):

MR. BOYACK: Your Honor, I would only ask that our non-consent to the waiver not prejudice our case in this matter.

THE COURT: Well, that observation ought to require you to come forward to that desk and have the Court tell you that he adjudges you in contempt of court and take about $500 away from you.

MR. BOYACK: No disrespect was meant by that, Your Honor.

THE COURT: Well, it was a very disrespectful statement. . . .

During the trial of the *Nakai* case respondent criticized government counsel for interviewing the nine-year-old carnal knowledge victim prior to trial (App. 327-28):

THE COURT: Well, you were coaching your witness, that is perfectly obvious. You were coaching that witness and now you want to ask leading questions in the courtroom and I don't think that is due process of law.

MR. BOYACK: I think it is perfectly appropriate for us to interview witnesses and –

THE COURT: Well, how much experience have you had, son, that would lead you to make a statement to a United States District Judge, with 28 years experience on the bench, that it is your judgment that it is appropriate. Now on what basis do you determine that it is appropriate? What experience have you had with little Indian girls in the courtroom trying to testify, trying to gain information out of them? I think the Government is in very deep troubled water.

N. During a hearing on May 18, 1977, in a civil case not involving the United States, respondent interrupted the argument to announce his displeasure and intention of suing the United States Attorney, an Assistant United States Attorney and other public officials. He added that there were also

"lesser fish to fry."[62] Respondent has confiscated the court reporter's notes of this proceeding and refuses to permit the reporter to prepare a transcript despite repeated requests from the United States Attorney.[63]

O. During a law and motion day held June 3, 1977, Judge Ritter repeatedly attacked the United States Attorney's office for filing minor offenses in his court and for pressing for magistrate trials and a collateral forfeiture system for minor offenses committed in the District of Utah.[64] During the arraignment in *United States v. Wise*, CR-77-00028, the Judge stated (App. 397):

> THE COURT: Another petty offense. We're up to big business here today. The district attorney's office up there is up to big business.

During the arraignment in *United States v. Wood*, CR-77-00048, Judge Ritter said the following (App. 420):

> THE COURT: Now, there's a lot of these petty offenses here today because the district attorney is trying to push this on me. His time here is very limited. The FBI has investigated a successor, and that name will be announced very shortly and we'll be well rid of this fellow we've had around here. This calendar is an excellent example of it.
>
> I'm lined up on the side of the people who are entitled to enjoy their parks. It's their parks. It's their recreation areas.

Judge Ritter criticized the United States Attorney again during the arraignment in *United States v. Jensen*, CR-77-00050 (App. 778):

> THE COURT: , . . All right, this is another one of the park cases. This is a great business you fellows

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[62] *See* pp. 60-61, *supra*.

[63] *See In the Matter of Transcripts Withheld from the United States by the Honorable Willis W. Ritter*, No. 77-1491 (10th Cir. Judicial Council, filed July 5, 1977) (App. 544-61).

[64] *See* pp. 40-43, *supra*.

> have been up to. This is Ramon Child's last pitch. He's a lame duck today, but he's got a lot of stuff on this calendar. He's the worst United States district attorney they ever had in this courtroom, not only in my time, but in any time.

V

RESPONDENT NEGLECTS AND MISHANDLES THE GOVERNMENT'S CIVIL CASES

A. Respondent refuses to hear pending motions and trials in civil cases in which the United States, or an officer or agent thereof, is a party.

Respondent has heard motions in only three federal civil cases since August 1976, although motions have been pending in many more such cases and motions in numerous private civil cases have been heard during this time.[65] For example, respondent conducted a civil law and motion calendar on March 10-11, 1977; 80 civil matters were set for hearing. Not one government case was among that number, although motions were then pending in at least 16 government cases older than the newest case included on the calendar.[66] No civil case involving the government has been tried since

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[65] The only government cases in which civil motions have been heard since August 1976 are *Usery v. Cox*, C-75-376, *reversed sub nom. Usery v. Ritter*, 547 F.2d 528 (10th Cir. 1977). in which respondent scheduled argument for October 1, 1976, on the defendants' motion for order to show cause why the Secretary of Labor should not be held in contempt; *United States v. Prudential Federal Savings & Loan*, C-76-124, in which argument occurred on April 8, 1977, on the defendants' motion for leave to file a counterclaim; and *Phillips Petroleum v. Andrus*, C-77-0165, *appeal pending*, No. _____ in which respondent issued a preliminary injunction against the government.

[66] A list of these 16 cases appears at App. 784.

February 10, 1976,[67] although approximately 40 private, civil cases have been scheduled for trial by respondent since that date.[68]

B. Respondent refuses to enforce civil summonses issued by the Internal Revenue Service.

Under 26 U.S.C. §7602 the Internal Revenue Service is authorized to summon taxpayers to provide testimony and documents relating to pending investigations of tax liability. *See generally United States v. Bisceglia*, 420 U.S. 141 (1975). The IRS cannot enforce its own summonses but must rely on the courts to do so pursuant to 26 U.S.C. §7604.

It is the prevailing practice for district courts, upon a proper showing by the government, to sign an order requiring the taxpayer to appear and show cause why he should not be compelled to comply with the summons. To obtain such an order the IRS need only demonstrate that the investigation is proceeding pursuant to a legitimate purpose, that the examination of the summoned taxpayer may be relevant to the purpose, that the information sought is not already in the agency's possession and that the required administrative steps have been followed without compliance by the summoned taxpayer. *Bisceglia, supra.*

Respondent refuses to sign orders to show cause. Until August 1976 he customarily dismissed enforcement proceedings *sua sponte*. His position was made clear in *United States v. Wallace*, C-75-305, in which the government four times sought to enforce an IRS summons without success. The following occurred on May 27, 1976, when the government sought to enforce the summons for the fourth time (App. 785-87):

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[67] The case of *Albrechtsen v. Morton*, No. 76-1522 (10th Cir., notice of appeal filed May 12, 1976), was tried to the court on February 10, 1976.

[68] As an example, *Balka v. Hoffman*, C-75-355, is a government case which is older and had been awaiting trial longer than nine of the twelve cases set by respondent for trial in March 1977.

THE COURT: All right, the next one, Jackson, Revenue Officer, against Douglas Wallace. Petition to enforce an Internal Revenue Summons.

MR. WHEELER: Your Honor, apparently the taxpayer has again failed to respond to the Notice of the Clerk.

THE COURT: Well, I will tell you what I do with these. I tell the Internal Revenue Service that they have all kinds of summary remedies in the I.R.S. Act and they ought to proceed administratively and not call upon this Court to bulldoze taxpayers into doing something that the I.R.S. has not exhausted the remedies they already have.

Now that is my position on these. I have been turning you down on them. This isn't the first one.

MR. WHEELER: Your Honor, there is no other way to enforce these summons except to bring them into Court.

THE COURT: You have got all kinds of remedies, all kinds of remedies. Go get his bank account records; investigate him from "A" to "Israel" and I think that the Internal Revenue Service has plenty of administrative remedies. They are pretty effective and this Court isn't going to be bulldozing the citizens into complying with the I.R.S. orders that the I.R.S. is perfectly able to enforce themselves.

Maybe they can't issue the kind of judicial order you want here but they can get after the taxpayer. So this motion and any others of like kind, a petition for an order to show cause why the defendant should not be compelled to obey an Internal Revenue summons, that motion is denied and all motions like it are going to be denied. We are not going to turn this Court into an administrative enforcement officer of the I.R.S. That's all there is about that.

The United States appealed *United States v. Nichols*, C-76-154, *reversed*, No. 76-1705 (10th Cir., decided Feb. 11, 1977), in which respondent had made a similar ruling. Once the United States filed its appeal in *Nichols*, respondent decided that he would consider government petitions for

orders to show cause only if the taxpayer voluntarily appears at the hearing on the motion. This approach thwarts enforcement proceedings and at the same time avoids appellate review. [69]

VI

RESPONDENT CONDUCTS THE BUSINESS OF HIS COURT IN A MANNER WHICH HAS DESTROYED PUBLIC CONFIDENCE IN HIS ABILITY TO ADMINISTER JUSTICE.

Respondent has recently confirmed that the federal judicial system in Utah is "eroding badly" and is "the object of public scorn and contempt." In the same statement he referred to "the breakdown of the federal judicial system in Utah."[70]

The United States' belief that respondent's court is in a state of disarray and lacks the confidence of the public is supported by the reaction of the public media to the Judge's behavior.[71]

ARGUMENT

I

RESPONDENT SHOULD BE REMOVED FROM FEDERAL CRIMINAL CASES, AND NO ADDITIONAL CIVIL CASES SHOULD BE ASSIGNED TO HIM.

We have set out a lengthy statement of facts in this petition because, in our view, respondent's conduct of his court

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[69] *See* pp. 83-85 *supra*.

[70] Affidavit of Honorable Willis W. Ritter in support of petition for writ of certiorari in *Sims v. Western Steel Co.*, 551 F.2d 811 (10th Cir. 1977) (App. 788-91).

[71] Copies of a sampling of news articles reflecting to a degree the detrimental impact of respondent's actions on public confidence are collected at App. 792-819.

speaks for itself. We have summarized in the Introduction at pages 4-11, *supra*, the brunt of our concern. The authority of a district judge over the conduct of the courtroom is so great that a judge determined to defy the applicable legal rules can do so – at least when the Double Jeopardy Clause prevents a second prosecution. Even when appellate review is feasible, a determined district judge has ample power to frustrate the administration of justice.

We believe that the administration of justice has broken down in the Central Division of the District of Utah. Nothing can get around these simple facts: Judge Ritter refuses to try federal civil cases; he will not enforce IRS summonses; he tries only a few criminal cases, and in almost every one he either makes a reversible error or acts unalwfully in a way that would prevent a conviction; Judge Ritter will not allow the prosecution of misdemeanors or petty offenses, even though state courts lack the jurisdiction to try such offenses committed within federal enclaves. Thus, there is no functioning federal court for civil cases or tax summons enforcement, no functioning federal court for misdemeanors and petty offenses, and, in a very real sense, no functioning court for felony cases.

We do not impugn respondent's capacity or honesty as a judge. Our concern, rather, is that he has become a law unto himself. He invents and follows his own rules, is swayed by his own preconceptions of legal procedure, and is determined that no outside force – not the arguments of counsel, not the holdings of this Court – shall interfere with the conduct of his court. He feels no responsibility to the litigants to explain or justify his decisions. He brooks no argument and does not tolerate even well-mannered opposition to his views. He attempts to make his decisions in such a way that this Court will be unable to correct his errors. We do not believe that a judge so disposed should be permitted to continue to bear primary responsibility for the administration of justice in Utah's federal courts.

The problem in respondent's court is pervasive. The statement of facts in this petition is concerned almost entirely with cases respondent has heard during the last two years.

More important, it discusses almost every one of respondent's recent federal cases. Few indeed are conducted with the care and impartiality that litigants have a right to expect in federal court.

The United States has, during the last several years, attempted to gain some measure of relief by appealing respondent's adverse decisions whenever we consider them legally erroneous and appeal is available, and by seeking writs of mandamus from this Court. Our efforts in this regard, and those of this Court, although helpful, also have led in many instances to retaliation by respondent (see pages 96-106, *supra*). We have witnessed a deterioration in the relations between respondent and the United States Attorney's office to the point that court sessions now are occupied to a considerable extent with verbal abuse by respondent of the attorneys for the government. This atmosphere is not conducive to the evenhanded administration of justice or to its appearance.

The United States has reluctantly reached the conclusion that ordinary appellate remedies, and the issuance of extraordinary writs, are insufficient to overcome the problems that impede the administration of justice in respondent's court. We therefore, after lengthy consideration and consultation within the Department of Justice, and the approval of two Attorneys General, two Deputy Attorneys General, and two Solicitors General – three of these men former federal judges – have concluded that it is necessary to ask this Court to sharply curtail the authority of respondent to decide cases in which the federal government is a party.[72]

We recognize that this request presents this Court with difficult problems and that the relief we seek is exceptional. But there are limits beyond which no person – even a federal judge – should be allowed to go with impunity. We respect-

[72] Attorney General Bell, Deputy Attorney General Flaherty and Solicitor General McCree have considered and approved this request for relief. Former Attorney General Levi, former Deputy Attorney General Tyler, and former Solicitor General Bork all gave tentative approval to this request.

fully suggest that Judge Ritter has overstepped those limits, and in doing so he has brought the administration of justice to a standstill in much of Utah and has brought the judiciary into disrepute. We believe that this Court has both the power and the duty to restore to the people of Utah a functioning federal district court in the Central Division.[73]

II

THIS COURT HAS AUTHORITY TO GRANT THE RELIEF WE SEEK.

A. Mandamus lies to supervise persistent misconduct by district judges.

It is true that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976). It is difficult, however, to imagine a situation more extraordinary than that now presented.

Relief by mandamus in ongoing cases often is withheld because "it is in the interest of fair and prompt administration of justice to discourage piecemeal litigation" (*id.* at 403). We have filed the present request for just that reason: "it is in the interest of fair and prompt administration of justice" to bring to an end piecemeal litigation concerning respondent's conduct of federal cases. We seek resolution in a single case of contentions that govern hundreds of cases and that will have a profound effect upon the administration of justice in Utah. The United States has "no other adequate means to attain the relief [it] desires" (*ibid.*), and mandamus therefore is the appropriate remedy.

[73] Our concern is greatest in criminal cases, in which the Double Jeopardy Clause often prevents any attempt to correct respondent's errors (*see United States v. Fay, supra*), and both the government and the defense have pressing interests in prompt resolution of pending cases. But civil cases, too, involve important interests, and justice is not served by assigning additional civil cases to a judge who is unwilling or unable to hear and decide them.

There is, of course, no direct precedent for the relief we seek; the United States has never before found it necessary to make such a request. But the proper use of mandamus in other situations strongly suggests that it is available here as well.

When it has proven impracticable to control repeated abuses by the appellate process, appellate courts have ultimate authority to use mandamus to ensure the proper conduct of the district courts. *See LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957). There comes "an end of patience" (*id.* at 258), and when that point is reached mandamus lies to achieve "supervisory control of the District Courts by the Courts of Appeals necessary to proper judicial administration in the federal system" (*id.* at 259-260). Mandamus is especially appropriate where, as here, nonissuance of the writ will defeat any appellate review (*Maryland v. Soper*, 270 U.S. 9, 29-30 (1926)). *See generally* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595, 610, 626-628 (1973).

The use of the writ is an established way to put an end to defiance of legal rules. For example, in *Ex parte United States*, 287 U.S. 241 (1932), a district court had received an indictment by a grand jury but had refused to issue an arrest warrant to bring the defendant within its jurisdiction. The Supreme Court issued mandamus; it wrote (287 U.S. at 250-251) that the district court's conduct fell "little short of a refusal to permit the enforcement of the law," a power the district court did not possess. The Court explained that "[t]he power to enforce does not inherently beget a power to refuse to enforce." (*ibid.*), and that appellate courts should intervene by mandamus to thwart a district court's refusal to enforce the law.[74] For the reasons we have set out above, we believe that respondent's conduct falls "little short of a

[74] This Court has held that district judges have no "discretionary" power to terminate prosecutions. *See United States v. Hudson*, 545 F.2d 724 (10th Cir. 1976). *See also United States v. Hall*, 9th Cir., No. 76-1080, decided August 26, 1977.

refusal to permit the enforcement of the law," and that the intervention by this Court therefore is necessary.

This Court has used mandamus before to determine which district judges will hear particular cases. In *United States v. Ritter, supra*, 540 F.2d 459, it issued the writ because it found that the United States could not expect to receive a fair trial from Judge Ritter. *See also Occidental Petroleum Corp. v. Chandler*, 303 F.2d 55 (10th Cir. 1962) (*en banc*), *cert denied*, 372 U.S. 915 (1963); *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 936 (1966). This Court has used mandamus to carry out the division of business in Utah prescribed by the Judicial Council. *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100 (10th Cir. 1972) (*en banc*).

In all of these cases this Court has found it necessary to require district judges to carry out the applicable legal rules and to act in the manner required of the federal judiciary. Where the problem is widespread, the remedy should be commensurate. We believe that we have documented a pattern of abuse, and that the time has come for relief to be broader than simple removal from a specific case.[75]

B. The Judicial Council may make administrative orders to reallocate the business of district judges.

The Judicial Council of this Circuit has plenary authority to issue administrative orders to reallocate judicial business. 28 U.S.C. §332(d) provides that "[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council." The Council has "broad powers . . . in seeing that the district court's business is conducted effectively, expeditiously, and in a manner that inspires public confidence" (*Utah-Idaho Sugar Co. v. Ritter, supra*, 461 F.2d at 1103).

[75] Mandamus has been employed to disqualify judges entirely. *United States v. Malmin*, 272 F. 785 (3d Cir. 1921), involved a writ of mandamus to unseat one judge in the District of the Virgin Islands and to seat another.

The judicial Council of this Circuit has entered orders with respect to at least one other judge relying upon §332(d). Although the Supreme Court ultimately did not pass upon the validity of those orders, Mr. Justice Harlan, the only Justice who discussed the problem, took the position that the Section provides ample authority to remove part or all of a district judge's cases when that proves necessary for the effective conduct of judicial business. *See Chandler v. Judicial Council,* 398 U.S. 74, 118-129 (1970) (Harlan, J., concurring); *see also id.* at 84-85, 86 n. 7 (opinion of the Court). Mr. Justice Harlan concluded, rightly in our view, that the Judicial Council may take whatever action is necessary to thwart "a threat to public confidence in the administration of justice" (398 U.S. at 125).[76]

The legislative history of the creation of the Judicial Councils supports Mr. Justice Harlan's interpretation of their authority. The most important legislative document pertaining to the Judicial Councils since their creation is H. Doc. 201, 87th Cong., 1st Sess. (1961), a report by the Judicial Conference of the United States on the operation and powers of the Circuit Councils. The report of the Conference, which received the approval of Congress, states (at pages 8-9) that the Circuit Councils have not only technical administrative authority but also the power to take effective measures to avoid "stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, for the actions of a judge or other person attached to the courts."

This Court took a broad view of its authority in its dealings with Judge Chandler. The Third Circuit has taken a similar view; it reassigned all criminal cases to other judges

[76] *See also Ex parte Briggs,* 15 F.2d 84 (1925) (Van Valkenbaugh, J., in chambers) (the senior judge of the court of appeals has the authority to reallocate cases among district judges in the interest of justice); *Hilbert v. Dooling,* 476 F.2d 355 (2d Cir. 1973) (the powers of the Judicial Council are broad; the Council may promulgate rules to achieve justice in the district courts).

when one district judge became suspected of corruption.[77] One author has collected other instances. Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration,* 37 U. Chi. L. Rev. 203, 230 (1970). Moreover, Congress thoroughly reexamined the powers of the Judicial Councils and reenacted Section 332(d) *verbatim* in 1971, fully aware of the use this Court had made of that authority in the *Chandler* case.[78] This reenactment confirms the powers of the Councils to take similar action if it should again become necessary.

C. The exercise of appellate control over the assignment of cases to district judges is consistent with Article III of the Constitution.

The salary and tenure provisions of Article III of the Constitution provide a formidable bulwark against attempts by the Executive and Legislative Branches to interfere with the independence of the federal judiciary. The provisions of Article III insulate judges from almost all forms of outside influence.

It is not necessary to consider here whether impeachment is the only permissible way of removing a judge from

[77] Statement of Chief Judge Biggs, Hearings on Judicial Fitness before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., Pt. 1, p. 19 (1966). Chief Judge Biggs suggested that the same result could have been achieved by mandamus. *Id.* at 13.

[78] Two committees had held extensive hearings about the *Chandler* case and suggestions for the removal of judges by routes other than impeachment. Hearings on S. 1506 before the Sub-committee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969); Hearings on the Independence of Federal Judges before the Sub-committee on Separation of Powers of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970).

office,[79] because nothing in the relief we have requested would remove respondent from office. Nothing would affect his status, salary or tenure. It is no more suspect as a constitutional matter than the certificate of disability provided by 28 U.S.C. §372(b), which would declare a judge's seat vacant but continue his salary and status. Indeed, it is less, since nothing in the relief we have requested would deprive respondent of authority to decide non-government cases. He would continue to sit as a judge and to exercise judicial powers.

We have the greatest respect for the principle that judges should be independent of improper influence. Our judicial system depends in no small meausre on ensuring respect for judicial independence. But independence never has been thought to mean absolute liberty. Judges, like other federal officials, are bound to follow laws and regulations established by other branches of the government. Congress has required judges to recuse themselves in certain matters (see 28 U.S.C. §§144 and 455(a)); no one has argued that these statutes trench on judicial autonomy.[80] District judges must follow mandates issued by courts of appeals and the Supreme Court. Article III established independence in two vital respects –

[79] This question has sparked a lively debate. Compare Berger, *Impeachment: The Constitutional Problems*, 122-192 (1973) (impeachment is not the only method of removal), with Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. Chi, L. Rev. 665 (1969) (impeachment is sole method of removal). The debate is taken up most recently in a report by the Committee on Federal Legislation of the Association of the Bar of the City of New York entitled *The Removal of Federal Judges Other Than by Impeachment* (1977).

[80] Similarly, Article III does not contain a guarantee that a judge will be allowed to decide federal criminal cases. The judges of the Court of Claims and the Court of Customs and Patent Appeals are Article III judges (*Glidden v. Zdanok*, 370 U.S. 530 (1962)), yet neither court hears criminal cases. Both courts have extremely limited jurisdiction, in many ways more limited than would be Judge Ritter's general civil jurisdiction if this Court grants the relief we seek.

salary and tenure – but it did not establish a general principle of freedom from responsibility to general rules for the conduct of judicial business.

Moreover, Article III does not shield a judge from pressure and orders *by other judges* designed to ensure that the law is carried out. Some control of judges by other judges is necessary if we are to have a functioning judiciary as well as a sitting one. As Mr. Justice Harlan put it in *Chandler, supra*, 398 U.S. at 129: "there are strong assertions of the importance of an independent federal judiciary. I fully agree that this principle holds a profoundly important place in our scheme of government. However, I can discern no incursion on that principle in the legislation creating the Judicial Councils and empowering them to supervise the work of the district courts, in order to ensure the effective and expeditious handling of their business." *See also Ex parte Briggs, supra.*[81]

Under Article III no federal judge need be concerned about the consequences of honest judicial decisions. There may be no retaliation for unpopularity. But nothing in the Constitution prevents federal courts from exercising their supervisory or administrative powers to assign new cases to judges willing and able to carry out their duties in accord with the prevailing rules of law. A district judge is not a law giver, for then we would have a government of men and not of laws. A district judge is a servant of the law, and his great responsibilities compel him to be more, not less, humble in its service.

[81] Control of district judges by appellate judges is particularly important because, as a practical matter, Congress cannot be expected to pause for a month or more to impeach and try a single federal district judge when the judge's dereliction – as here – consists of repeated violation of legal principles in the conduct of judicial business rather than the commission of an easily identified federal crime. There are simply too many judges, and too many competing demands upon Congress's time, for it to be an effective reviewer of judicial performance.

CONCLUSION

No new civil cases involving the federal government or any of its agents or employees should be assigned to Judge Ritter. All criminal cases now on Judge Ritter's docket should be transferred to one or more other judges, and no new criminal cases should be assigned to him. Another judge should be designated to supervise the grand juries and conduct other administrative duties associated with cases involving the federal government.

Respectfully submitted.

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ADDENDUM

(Pursuant to Rule 28(f), Federal Rules of Appellate Procedure)

STATUTES INVOLVED:

18 U.S.C. §2511(2)(c)

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. §3060(e)

(e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirements of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.

18 U.S.C. §3161 *et seq.*

§3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-

day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from trials with respect to other charges against the defendant;

(D) delay resulting from interlocutory appeals;

(E) delay resulting from hearings on pretrial motions;

(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

18 U.S.C. §3161 *et seq.* (Continued)

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

18 U.S.C. §3161 *et seq.* (Continued)

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

(C) No continuance under paragraph 8(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

18 U.S.C. §3161 *et seq.* (Continued)

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly–

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery.)

Added Pub.L. 93-619, Title I, §101, Jan. 3, 1975, 88 Stat. 2076.

18 U.S.C. §3162

§3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

18 U.S.C. §3162 (Continued)

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

Added Pub.L. 93-619, Title I, §101, Jan. 3, 1975, 88 Stat. 2079.

18 U.S.C. §3163

§3163. Effective dates

(a) The time limitation in section 3161(b) of this chapter–

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission

18 U.S.C. §3163 (Continued)

of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter–

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Section 3162 of this chapter shall become effective after the date of expiration of the fourth twelve-calendar-month period following July 1, 1975.

Added Pub.L. 93-619, Title I, §101, Jan. 3, 1975, 88 Stat. 2080.

18 U.S.C. §3164

§3164. Interim limits

(a) During an interim period commencing ninety days following July 1, 1975 and ending on the date immediately preceding the date on which the time limits provided for under section 3161(b) and section 3161(c) of this chapter become effective, each district shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving–

(1) detained persons who are being held in detention solely because they are awaiting trial, and

(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.

(b) During the period such plan is in effect, the trial of any person who falls within subsection (a)(1) or (a)(2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence

18 U.S.C. §3164 (Continued)

no later than ninety days following the first day of the interim period.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

Added Pub.L. 93-619, Title I, §101, Jan. 3, 1975, 88 Stat. 2081.

* * *

18 U.S.C. §3731

§3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

18 U.S.C. §3731 (Continued)

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

As amended May 24, 1949, c. 139, §58, 63 Stat. 97; June 19, 1968, Pub.L. 90-351, Title VIII, §1301, 82 Stat. 237; Jan. 2, 1971, Pub.L. 91-644, Title III, §14(a), 84 Stat. 1890.

18 U.S.C. §4244

§4244. Mental incompetency after arrest and before trial

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity

18 U.S.C. §4244 (Continued)

or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. Added Sept. 7, 1949, c. 535, §1, 63 Stat. 686.

26 U.S.C. §7602

§7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized–

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Aug. 16, 1954, c. 736, 68A Stat. 901.

26 U.S.C. §7604

§7604. Enforcement of summons

(a) Jurisdiction of district court.–If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.–Whenever any person summoned under section 6420(e) (2), 6421(f) (2), 6424(d) (2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) Cross references.–

(1) Authority to issue orders, processes, and judgments.–

For authority of district courts generally to enforce the provisions of this title, see section 7402.

(2) Penalties.–

For penalties applicable to violation of section 6420(e) (2), 6421(f) (2), 6424(d) (2), or 7602, see section 7210.

28 U.S.C. §137

§137. Division of business among district judges

The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

28 U.S.C. § 137 (Continued)

The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

28 U.S.C. § 144
§ 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 332
§ 332. Judicial councils

(a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

* * *

28 U.S.C. § 455(a)
§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

28 U.S.C. § 455(a) (Continued)

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 1651(a)
§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

* * *

RULES INVOLVED:

Federal Rules of Criminal Procedure

Rule 5.1

PRELIMINARY EXAMINATION

(a) **Probable Cause Finding.** If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) **Discharge of Defendant.** If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

Rule 11.

PLEAS

(c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) **Insuring That the Plea is Voluntary.** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) **Plea Agreement Procedure.**

(1) **In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) **Acceptance of a Plea Agreement.** If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) **Rejection of a Plea Agreement.** If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) **Time of Plea Agreement Procedure.** Except for good cause shown, notification to the court of the

existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty of nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

* * *

Rule 12.

PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

* * *

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show

jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time, for the making of pretrial motions or requests and, if required, a later date of hearing.

* * *

(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

* * *

Rule 12.2

NOTICE OF DEFENSE BASED UPON MENTAL CONDITION

(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a

failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Mental Disease or Defect Inconsistent with the Mental Element Required for the Offense Charged. If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Psychiatric Examination. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state.

Added April 22, 1974, Eff. Dec. 1, 1975; amended July 31, 1975, Pub.L. 94-64, §3(14), 89 Stat. 373.

Rule 16.

DISCOVERY AND INSPECTION

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to

the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. §3500.

(3) Grand Jury Transcripts. Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) **Failure to Comply with a Request.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

Rule 23.

TRIAL BY JURY OR BY THE COURT

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

* * *

Rule 29.

MOTION FOR JUDGMENT OF ACQUITTAL

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 30.

INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 32.

SENTENCE AND JUDGMENT

(a) **Sentence.**

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.

* * *

Rule 50.

CALENDARS; PLAN FOR PROMPT DISPOSITION

(a) Calendars. The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable.

(b) Plans for Achieving Prompt Disposition of Criminal Cases. To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare plans for the prompt disposition of criminal cases in accordance with the provisions of Chapter 208 of Title 18, United States Code.

As amended April 24, 1972, eff. Oct. 1, 1972; Mar. 18, 1974, eff. July 1, 1974; Apr. 26, 1976, eff. Aug. 1, 1976.

Federal Rules of Evidence

RULE 103.

RULINGS ON EVIDENCE

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

* * *

Rule 401.

DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 404.

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 607.

WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling him.

Rule 615.

EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Rule 704.

OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 801.

DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if–

(a)1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity of (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

As amended Pub.L. 94-113, §1, Oct. 16, 1975, 89 Stat. 576.

Federal Rules of Appellate Procedure

Rule 21.

WRITS OF MANDAMUS AND PROHIBITION DIRECTED TO A JUDGE OR JUDGES AND OTHER EXTRAORDINARY WRITS

(a) Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts

necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

1976 Plan for Prompt Disposition of Criminal Cases in the District of Utah Section III, Paragraphs 1 – 6

III. Statement of Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases.

Pursuant to the requirements of rule 50(b) of the Federal Rules of Criminal Procedure, the Speedy Trial Act of 1974 (18 USC §§5036, 5037), the judges of the United States District Court for the District of Utah have adopted the following time limits and procedures to minimize undue delay and to further the prompt disposition of criminal cases and certain juvenile proceedings:

1. **Applicability.**

(a) Offenses. The time limits set forth herein are applicable to all criminal offenses triable in this court, except for petty offenses are defined in 18 USC §1(3). Except as specifically provided, they are not applicable to proceedings under the Federal Juvenile Delinquency Act.

(b) Persons. The time limits are applicable to persons accused who have not been indicted or informed against as well as those who have, and the word "defendant" includes such persons unless the context indicates otherwise.

2. **Priorities in Scheduling Criminal Cases.**

Preference shall be given to criminal proceedings as far as practicable as required by rule 50(a) of the Federal Rules of Criminal Procedure. The trial of defendants in custody solely because they are awaiting trial and of high-risk defendants as defined in section 6 should be given preference over other criminal cases.

3. **Time Within Which an Indictment or Information Must be Filed.**

(a) Time Limits. If an individual is arrested or served with a summons and the complaint charges an offense to be prosecuted in this district, any indictment or information subsequently filed in connection with such charge shall be filed within the following time limits:

(1) If the arrest or service occurs before July 1, 1976, within 60 days of July 1, 1976;

(2) If the arrest or service occurs on or after July 1, 1976, but before July 1, 1977, within 60 days of arrest or service;

(3) If the arrest or service occurs on or after July 1, 1977, but before July 1, 1978, within 45 days of arrest or service;

(4) If the arrest or service occurs on or after July 1, 1978, but before July 1, 1979, within 35 days of arrest or service.

(b) Grand Jury Not in Session. If the defendant is charged with a felony to be prosecuted in this district, and no grand jury in the district has been in session during the period prescribed in subsection (a), such period shall be extended an additional 30 days.

(c) Measurement of Time Periods. If a person has not been arrested or served with a summons on a Federal charge, an arrest will be deemed to have been made at such time as the person (i) is held in custody solely for the purpose of responding to a Federal charge; (ii) is delivered to the custody of a Federal official in connection with a Federal charge; or (iii) appears before a judicial officer in connection with a Federal charge.

4. **Time Within Which Arraignment Must Be Held.**

(a) Time Limits. A defendant shall be arraigned within 10 days of the last to occur of the following dates:

(1) The date on which an indictment or information is filed;

(2) The date on which a sealed indictment or information is unsealed;

(3) The date of the defendant's first appearance before a judicial officer of this district; or

(4) July 1, 1976.

(b) Measurement of Time Periods. For the purposes of this section: an arraignment shall be considered to take place at the time a plea is taken or is entered by the court on the defendant's behalf.

5. Time Within Which Trial Must Commence.

(a) Time Limits. The trial of a defendant shall commence within the following time limits:

(1) If the arraignment occurs before July 1, 1976, within 180 days of July 1, 1976;

(2) If the arraignment occurs on or after July 1, 1976, but before July 1, 1977, within 180 days of the arraignment;

(3) If the arraignment occurs on or after July 1, 1977, but before July 1, 1978, within 120 days of the arraignment;

(4) If the arraignment occurs on or after July 1, 1978, but before July 1, 1979, within 80 days of the arraignment.

(b) Retrial. The retrial of a defendant shall commence within 60 days from the date the order occasioning the retrial becomes final. If the retrial follows an appeal or collateral attack, the court may extend the period if unavailability of witnesses or other factors resulting from passage of time make trial within 60 days impractical. The extended period shall not exceed 180 days.

(c) Withdrawal of Plea. If a defendant enters a plea of guilty or nolo contendere to any or all charges in an indictment or information and is subsequently permitted to withdraw it, the arraignment with respect to the entire indictment or information shall be deemed to have been held on the day the order permitting withdrawal of the plea becomes final.

(d) Superseding Charges. If, after an indictment or information has been filed, a complaint, indictment, or information is filed which charges the defendant with the same

offense or with an offense required to be joined with that offense, the time limit applicable to the subsequent charge will be determined as follows:

(1) If the original indictment or information was dismissed on motion of the defendant before the filing of the subsequent charge the time limit shall be determined without regard to the existence of the original charge.

(2) If the original indictment or information is pending at the time the subsequent charge is filed, the trial shall commence within the time limit for commencement of trial on the original indictment of information.

(3) If the original indictment or information was dismissed on motion of the United States Attorney before the filing of the subsequent charge, the trial shall commence within the time limit for commencement of trial on the original indictment or information, but the period during which the defendant was not under charges shall be excluded from the computations. Such period is the period between the dismissal of the original indictment or information and the date the time would have commenced to run on the subsequent charge had there been no previous charge.*

(4) In cases in which paragraph (2) or (3) applies but no arraignment is held on the original indictment or information the time limit for commencement of trial shall be computed as if such arraignment had been held on the last permissible day, determined under section 4(a).

(5) The time within which an indictment or information must be obtained on the subsequent charge, or

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*Under this rule of this paragraph, if an indictment was dismissed on May 1, with 20 days remaining within which trial must be commenced, and the defendant was arrested on a new complaint on June 1, the time remaining for trial would be 20 days from June 1: the time limit would be based on the original indictment, but the period from the dismissal to the new arrest would not count.

within which an arraignment must be held on such charge, shall be determined without regard to the existence of the original indictment or information.

(e) Measurement of Time Periods. For the purposes of this section:

(1) An arraignment shall be deemed to take place as provided in section 4(b).

(2) A trial in a jury case shall be deemed to commence when the jury is called into the jury box for voir dire.

(3) A trial in a non-jury case shall be deemed to commence on the day the case is called for trial,** provided that some step in the trial procedure immediately follows.

(f) Related Procedures.

(1) The court shall have sole responsibility for setting cases for trial after consultation with counsel. At the time of arraignment or as soon thereafter as is practicable, each case will be set for trial on a day certain or listed for trial on a weekly or other short-term calendar.***

(2) Individual calendars shall be managed so that it will be reasonably anticipated that every criminal case set for trial will be reached during the week of original setting. A conflict in schedules of Assistant United States Attorneys will not be ground for a continuance or delayed setting except under circumstances approved by the court and called to the court's

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**For purposes of Section 5(e)(3) a case is "called for trial" when it is announced by the bailiff or clerk in the courtroom as then to be tried or next case for trial.

***For defendants subject to section 6(a)(1) or 6(a)(2), it is recommended that the trial be set for not more than 75 days after the beginning of continuous detention or the designation as high risk. Setting an early trial date would allow for the possibility that trial must be delayed for reasons, such as illness, which would not be attributable to the fault of the accused or one of the attorneys.

attention at the earliest practicable time. The United States Attorney will familiarize himself with the scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce ready for trial.

(3) In the event that a complaint, indictment, or information is filed against a defendant charged in a pending indictment or information or in an indictment or information dismissed on motion of the United States Attorney, the trial on the new charge shall commence within the time limit for commencement of trial on the original indictment or information unless the court finds that the new charge is not for the same offense charged in the original indictment or information or an offense required to be joined therewith.

(4) At the time of the filing of a complaint, indictment, or information described in paragraph (3), the United States Attorney shall give written notice to the court of that circumstance and of his position with respect to the computation of the time limits.

(5) All pretrial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal docket.

6. Defendants in Custody and High-Risk Defendants.

(a) Time Limits. Notwithstanding any longer time periods that may be permitted under sections 3, 4, and 5, the following time limits will also be applicable to defendants in custody and high-risk defendants as herein defined:

(1) The trial of a defendant held in custody solely for the purpose of trial on a Federal charge shall commence within 90 days following the beginning of continuous custody.

(2) The trial of a high-risk defendant shall commence within 90 days of the determination or designation as high-risk.

(b) Definition of "High-Risk Defendant." A high-risk defendant is:

(1) One whose chances of appearing at his trial or other court proceedings have been judicially determined to be poor; or

(2) One reasonably designated by the United States Attorney as posing a danger to himself or any other person or to the community.

(c) Measurement of Time Periods. For the purposes of this section:

(1) When a defendant is apprehended and held in custody outside this district, custody for the sole purpose of trial shall be deemed to begin (i) in proceedings under rule 40(b) of the Federal Rules of Criminal Procedure, upon the finding and recommendation or order by the magistrate or judge that a warrant of removal shall issue or upon the defendant's arrest pursuant to a warrant issued on an indictment or information filed in this district, and (ii) in cases initially processed under rule 20, at such time as the defendant rejects disposition under rule 20.

(2) When a defendant is apprehended outside this district and is released pursuant to the provisions of chapter 207 of title 18, USC, the times set out above shall begin to run when the defendant returns to this district.

(3) A trial shall be deemed to commence as provided in sections 5(e)(2) and 5(e)(3).

(d) Related Procedures.

(1) If a defendant is being held in custody solely for the purpose of awaiting trial, the United States Attorney shall advise the court at the earliest practicable time of the date of beginning of such custody.

(2) The United States Attorney shall advise the court at the earliest practicable time (usually at the hearing with respect to bail) if the defendant is considered by him to be high risk.

(3) If the court finds that the filing of a "high risk" designation as a public record may result in prejudice to the defendant, it may order the designation sealed for such period as is necessary to protect the

defendant's right to a fair trial, but not beyond the time that the court's judgment in the case becomes final. During the time the designation is under seal, it shall be known to the defendant and his counsel but shall not be made known to other persons without the permission of the court.

7. Time Within Which Defendant Should be Sentenced.

(a) Time Limit. A defendant shall ordinarily be sentenced within 45 days of the date of his conviction or plea of guilty or nolo contendere.

8. Juvenile Proceedings.

(a) Time Within Which Trial Must Commence. An alleged delinquent who is in detention pending trial shall be brought to trial within 20 days of the date of which such detention was begun, as provided in 18 USC §5036.

(b) Time of Dispositional Hearing. If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than 20 court days after trial, unless the court has ordered further study of the juvenile in accordance with 18 USC §5037(c).

9. Exclusion of Time From Computations.

(a) Applicability. In computing any time limit under section 3, 4, or 5, the periods of delay set forth in 18 USC §3161(h) shall be excluded.

(b) Records of Excludable Time. The clerk of the court shall enter on the docket, in the form prescribed by the Administrative Office of the United States Courts, information with respect to excludable periods of time for each criminal defendant. With respect to proceedings prior to the filing of an indictment or information, excludable time shall be reported to the clerk by the United States Attorney.

(c) Stipulations.

(1) The attorney for the government and the attorney for . . . .

Nos. 77-1080 and 77-6073

In the Supreme Court of the United States

OCTOBER TERM, 1977

VIRGIL REDMOND, PETITIONER

v.

UNITED STATES OF AMERICA

FRANCIS LUND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. Exh. A)[1] is reported at 546 F. 2d 1386.

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[1]"Pet. Exh." refers to the Exhibits in No. 77-6073.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1977. Petitions for rehearing were denied on December 21, 1977 (Pet. Exh. B). The petition for a writ of certiorari in No. 77-6073 was filed on January 20, 1978. On January 18, 1978, Mr. Justice White extended the time for petitioner Redmond to file a petition to and including January 31, 1978, and the petition in No. 77-1080 was filed on January 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district judge's comments and questions deprived petitioners of a fair trial (both petitions).

2. Whether the prosecutor suppressed material evidence favorable to the defense (Pet. No. 77-6073 only).

3. Whether the district court's failure to rule on requested jury instructions prior to closing arguments was plain and prejudicial error in this case (Pet. No. 77-6073 only).

4. Whether conviction for multiple counts of using the mails in execution of a scheme to defraud violates the Double Jeopardy Clause (Pet. No. 77-6073 only).

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioners were convicted on eight counts of using the mails in the fraudulent sale of securities, in violation of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U.S.C. 77q(a) and 77x. Petitioners were sentenced to consecutive terms adding to 18 years' imprisonment, and each petitioner fined $40,000.

The evidence at trial established that petitioners, Carl Powers, and Rio de Oro Mining Company executed a

scheme to defraud stock purchasers of the value of more than 5.7 million shares of stock (II Tr. 97, 233, 249; III Tr. 270, 325, 326, 408, 423, 432, 449, 452, 455, 466, 527). Petitioner Redmond obtained control of Rio de Oro, a shell corporation, and merged it with two other shell corporations controlled by petitioners and Powers. Petitioner Lund, acting as attorney for Rio de Oro, prepared an opinion letter falsely stating that the stock acquired in one of the mergers was free-trading. Petitioners and Powers caused the stock acquired in these mergers to be distributed to themselves and their nominees and then sold the stock publicly through the mails or used it to pay for goods and services received by them (II Tr. 71, 76-78, 85, 239; III Tr. 366-368, 460; IV Tr. 541, 548, 558-561, 585, 593, 601, 644).

ARGUMENT

1. Both petitioners argue that their trials were beset with unwise and injudicious comments by the trial judge. We agree with petitioners. Many comments (see Pet. Exh. C) were improper; some were merely overzealous. We have previously expressed the view that the judge who tried this case no longer should be allowed to preside over criminal cases (see *United States* v. *Ritter*, C.A. 10, No. 77-1829, reprinted as an appendix to Pet. No. 77-1080. Although Judge Ritter's death has mooted our request for reassignment of his cases, we have taken special care to examine each of his remarks here to determine whether they were so prejudicial that petitioners were denied a fair trial.

We submit that the court of appeals properly held that petitioners were not deprived of a fair trial, and that although the case "comes close to the line, [it] is still within permissible bounds" (Pet. Exh. A, p. 12). See *Glasser* v. *United States*, 315 U.S. 60, 80-83. The evidence

of petitioners' guilt was overwhelming; they do not now contend otherwise. And the court mitigated the effects of its statements—not all of which were said in the jury's presence—by instructing the jury to decide the case only on the evidence and to disregard any comments by the judge that might reflect any view of the evidence (V Tr. 886-887):

> Now, if, in the course of the trial, this Judge has made any statement or remark or in any way indicated his view about the weight of the evidence, the credibility of the witnesses or the facts with which you disagree and entertain a different view, then you should follow your own view of the weight of the evidence, the credibility of the witnesses and the facts and wholly disregard anything that I said about those matters. Now, you are to follow your own view and disregard anything else that was said. Because you are the sole judges of the evidence and the facts.
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> * * * * *
>
> But, of course, during the trial as we were moving—and we did move this case rather rapidly—in ruling on the evidence as it comes in, I may have said some things that might be interpreted by you—I don't know that I did. In fact, I don't think I did. But if I did at any time make any statement or any remark, anything that you interpret as my view about the evidence, my view about the weight of the evidence or my view about the facts, you are wholly to disregard it. Follow your own views with respect to that evidence and its weight and the credibility that you think it ought to be given to the witnesses who testified.

There would be little point in discussing the effect of each of Judge Ritter's comments. The court of appeals has been sensitive to claims of misconduct by Judge Ritter; indeed, one of our objections to his continued holding of criminal trials was that his misconduct was so pervasive that it was practically impossible to obtain a conviction that would withstand appellate scrutiny (see, *e.g.*, *United States* v. *Peterson*, 456 F. 2d 1135 (C.A. 10)). The court of appeals' decision that the trial judge's conduct here was not sufficiently improper that a new trial must be held depends entirely on the particular facts of this case and does not require review by this Court.[2]

2. Petitioner Lund contends that the prosecutor and the district court suppressed material evidence favorable to the defense in failing to allow petitioner additional time to locate a witness (IV Tr. 741-742). The witness had been subpoenaed by the government but had been excused without testifying.[3]

But this witness was not unknown to Lund; his existence and testimony were not "suppressed." Because

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[2]Moreover, petitioner Redmond's contention that the district court's conduct deprived him of the effective assistance of counsel was not raised on appeal and therefore has not adequately been preserved for review here.

Petitioner Redmond's argument (Pet. 13) that the decision here conflicts with decisions of other courts is incorrect. The cases to which petitioner refers held only that particular conduct was sufficiently prejudicial to require a new trial; they applied in making that inquiry the same legal standard used by the court of appeals here.

[3]Although the district court initially refused to allow witnesses to be excused after testifying (II Tr. 123, 150-151), it later permitted some of them to leave unless instructed otherwise (III Tr. 267, 286, 365-366, 369, 425, 432, 441, 444, 454, 457, 481, 524, 532, 545, 555-556, 567, 584, 588, 592, 595, 598, 600, 613, 632).

petitioner Lund did not subpoena the witness or request that the government keep him on hand, he may not now complain.[4] As the court of appeals held (Pet. Exh. A, p. 7), the district court acted within its discretion in not delaying the trial to permit petitioner Lund to obtain the presence of the witness.

3. Petitioner Lund argues that the district court erred in not ruling before closing arguments on defense counsel's requested jury instructions and in refusing to give a particular good faith instruction requested by counsel. These claims do not warrant review.

The failure to rule on jury instructions prior to closing arguments was a clear violation of Fed. R. Crim. P. 30. But this error requires reversal only if it causes specific prejudice to a defendant. *Hamling* v. *United States*, 418 U.S. 87, 131-135. Petitioner Lund contends (No. 77-6073 Pet. 10) that the district court's failure to rule on the instructions precluded trial counsel from making an effective closing argument, because he "did not know whether he would be able to argue 'mistake of law' based on the court's instructions." But where, as here, the instruction given is correct, this general contention that better knowledge might have led to better argument is not enough to show prejudice. An earlier ruling simply would have dashed any hope petitioner may have had to argue "mistake of law."

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[4]During the third day of trial the prosecutor stated that he had fewer than ten remaining witnesses and might not call some of them (III Tr. 532-533). Petitioner was thus put on notice that the witness in question might be released. Petitioner was aware, moreover, that the district court would brook no delay in the production of witnesses by counsel. At the outset of the case, the district court stated (II Tr. 69):

> Now, I want the United States to have your witnesses organized and in the order in which they are to come in so there will be no delay whatsoever. If there is any delay we won't hear the witnesses. You folks will have to have the witnesses standing by and ready so that when one goes out another one comes in. I want that done efficiently and quickly.

The record shows that petitioner Lund knowingly made misrepresentations and took an active role in the fraudulent scheme (II Tr. 162, 168-169; IV Tr. 695, 736-738). The district court charged the jury on willfulness, specific intent, reasonable doubt, and the presumption of innocence (V Tr. 866-869, 897, 900); it was not required to give a "mistake of law" charge where the evidence did not show that petitioner had relied on an authoritative legal ruling that he was entitled to act as he did.

4. Petitioner Lund finally argues that his conviction of eight counts of using the mails in furtherance of a scheme to a defraud violates the "rule of lenity" and the constitutional prohibition against double punishment for a single "offense." But each separate use of the mails in the execution of a scheme to defraud is a separate offense. *United States* v. *Dioguardi*, 492 F. 2d 70, 83 (C.A. 2), certiorari denied, 419 U.S. 873; *United States* v. *MacRay*, 491 F. 2d 616, 619, 623-624 (C.A. 10), certiorari denied, 416 U.S. 972; *Sanders* v. *United States*, 415 F. 2d 621, 626 (C.A. 5), certiorari denied, 397 U.S. 976. See *Badders* v. *United States*, 240 U.S. 391, 394. Each of the counts of which petitioner was convicted referred to a separate offer and sale of specified securities to a certain named buyer, and each count alleged one specific use of the mails, thus setting out a separate and complete fraudulent transaction. Petitioner simply committed a plentitude of crimes to swindle many buyers. It was all part of a general scheme, but one scheme can comprise many discrete crimes.[5]

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[5]Because the evidence at trial established many different fraudulent transactions, this case provides no occasion to apply the principle of lenity, which means only that courts will not strain a statute to broaden its scope (or the number of crimes it creates). Compare *Bell* v. *United States*, 349 U.S. 81, 83-84, with *Scarborough* v. *United States*, 431 U.S. 563.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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